

**JOINT APPENDIX**

**JOHN F. DAVIS, CLERK**

**Supreme Court of the United States**

**OCTOBER TERM, 1967**

**No. 232**

**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**DAVID PAUL O'BRIEN**

**No. 233**

**DAVID PAUL O'BRIEN, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

**ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT**

**THE PETITION FOR CERTIORARI IN NO. 232 FILED ON JUNE 8,  
1967 AND IN NO. 233 ON JUNE 9, 1967  
CERTIORARI GRANTED ON OCTOBER 9, 1967**

Supreme Court of the United States

OCTOBER TERM, 1967

No. 232

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID PAUL O'BRIEN

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No. 233

DAVID PAUL O'BRIEN, PETITIONER

v.

UNITED STATES OF AMERICA

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ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT

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[fol. 1]

Criminal Docket No. 66-91-S

THE UNITED STATES

v.

DAVID PAUL O'BRIEN

VIOL. willfully and knowingly did mutilate, destroy and change by burning a certificate issued by Local Board No. 18, Selective Service System, Framingham, Mass. in viol. Title 50, App., U.S.C. Sec. 462(b)

DOCKET ENTRIES

1966

- Apr. 15 Indictment returned.
- 25 SWEENEY, D.J. Deft appeared with counsel for arraignment. Plea of not guilty Bail \$1,000 was. William Randall files appearance for deft. 10 days for special pleas.
- May 4 Appearance of John Wall for plttf filed.
- Send special plea up to Judge Sweeney when filed
- 10 Deft's motion to dismiss indictment filed.
- 19 Government's memorandum in opposition to deft's motion to dismiss filed. c/s.
- 23 SWEENEY, D.J. On deft's motion to dismiss Indictment—ADVISEMENT. Deft's memo to support motion to dismiss filed.
- May 25 SWEENEY, D.J. MEMORANDUM filed . . . The deft is charged in a one count indictment with wilfully burning his Registration Certificate in viol. of Title 50 App. U.S.C. P462(b). His counsel has now moved to dismiss the indictment on the ground that it violates various of his constitutional rights . . . . The motion to dismiss the indictment is denied. Cyps to John Wall, Asst US Atty. William Randall Esq.

[fol. 2]

1966

June 1 SWEENEY, D.J. Criminal jury trial begins—jury impaneled and sworn—evidence. conclusion of evidence—arguments—charge—committed to jury—deliberation. Verdict—jury finds deft guilty. Disposition June 12, 1966 at 2:00 P.M.

July 1 SWEENEY, D.J. Deft appeared without counsel for disposition. Continued to the custody of the Attorney General under provisions of the Youth Corrections Act. for treatment and supervision. 18 U.S.C. 5010(b).

8 SWEENEY, D.J. JUDGMENT AND COMMITMENT ENTERED. Copies to U. S. Probation, U. S. Atty. and Deft. Original and attested copies to U. S. Marshal.

15 Appearance of Henry Paul Monaghan, Attorney for Defendant, filed.

15 Notice of Appeal filed, copy sent to John Wall Asst. U.S. atty

15 Statement of Docket Entries and copy of Notice of Appeal delivered to Court of Appeals.

20 Appearance of Melvin L. Wulff, Attorney for Defendant, filed.

20 Appearance of Marvin M. Karpotkin, Attorney for defendant, filed.

20 Appearance of Howard S. Whiteside, Attorney for Defendant, filed.

20 Marshal's return of Judgment and Commitment: Deft delivered on July 12, 1966 to Federal Reformatory at Petersburg, Virginia.

[fol. 3]

## INDICTMENT

Criminal No. 66-91-S

The Grand Jury charges:

On or about the thirty-first day of March, 1966 at Boston in the District of Massachusetts, DAVID PAUL O'BRIEN of Boston, Massachusetts, willfully and knowingly did mutilate, destroy, and change by burning a certificate issued by Local Board No. 18, Selective Service System, Framingham, Massachusetts, pursuant to and prescribed by the provisions of the Universal Military Training and Service Act, as amended, and the rules and regulations promulgated thereunder, to wit, a Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462(b).

DEFENDANT'S MEMORANDUM TO SUPPORT  
MOTION TO DISMISS INDICTMENT

*Constitutional, Statutory and Regulatory Provisions  
Involved*

*U. S. Constitution, Article 1, Section 8*

The Congress shall have power . . .  
To raise and support armies . . .

*U. S. Constitution, First Amendment*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*U. S. Constitution, Fifth Amendment*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment [fol. 4] or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*U. S. Constitution, Eighth Amendment*

Excessive bail shall not be required, nor excess fines imposed, nor cruel and unusual punishments inflicted.

*U. S. Constitution, Ninth Amendment*

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

*U. S. Constitution, Tenth Amendment*

The powers not delegated to the United States by the Constitution, or prohibited by it to the States, are reserved to the States respectively, or to the people.

*Title 50, Appendix, United States Code, Section 462*

(b) (Language inserted by P. L. 89-152, 79 Stat. 586, amendment to Section 462(b) is underscored)

- (b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of non-residence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451-454, 455-471 of this Appendix), or rules or regulations promulgated hereunder; or (2) [fol. 5] who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters *knowingly destroys, knowingly mutilates*, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation,



photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections); or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed \$10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury.

**POINT 1--AMENDED SECTION 462(b) (3) DEPRIVES DEFENDANT O'BRIEN OF THE RIGHTS GUARANTEED TO HIM BY THE FIRST, NINTH, AND TENTH AMENDMENTS**

A. The First Amendment to the Constitution states "Congress shall make no law . . . abridging the freedom [fol. 6] of speech, or of the press . . ." Defendant O'Brien contends under the First Amendment that symbolic speech be entitled to the same degree of protection as verbal speech. This was the ground relied upon by defendant Miller in *United States v. Miller*, 249 FSupp. 59 (SDNY, Dec. 16, 1965). The First Amendment protects freedom of speech and this would stand to include speech by symbols as well as words. Had Defendant O'Brien torn up a piece of cardboard claiming that he hated his country, certainly no crime would have been committed. The fact that the piece of cardboard was in fact his draft card

does not change the guarantee or protection that Defendant O'Brien should be accorded under the First Amendment.

**POINT 2—AMENDED SECTION 462(b) (3) IS VOID UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT**

Defendant O'Brien contends that Title 50 Amended Section 462(b) (3) goes far beyond what is necessary or indeed whatever would be necessary to carry out or effect the military capabilities of the United States. To rely upon individuals having draft cards in their possession as a means of operative, the selective service system would seem to be impractical if not downright dangerous. The selective service boards maintain records, set up rules and regulations for the calling of men into the armed services, determine their general status and do all things necessary to provide manpower for the armed services. Whether Defendant O'Brien has his draft card in his possession, whether he burned, mutilated or whatever, will have little or no effect upon the selective service system. On its records, O'Brien still stands and will, I assume, be called when his turn is reached. To enact legislation and specifically this statutory provision to treat a boy who burns, mutilates or destroys a draft card in the same manner [fol. 7] as a person who forges the same would seem to deprive any man of his rights under the provisions of the Fifth Amendment.

**POINT 3—AMENDED SECTION 462(b) (3) AS IMPOSING A CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT**

To treat O'Brien with the same punishment for burning, or mutilating a draft card as could be meted out to said O'Brien if he forged the same would appear to go too far. This exceeds any conceivable "standard of decency".



## CONCLUSION

Defendant O'Brien requests that his motion be granted and the indictment dismissed.

Respectfully submitted

WILLIAM I. RANDALL  
*Defendant's Attorney*

## STENOGRAPHIC TRANSCRIPT OF TRIAL

SWEENEY, J. And a Jury

## APPEARANCES.

John Wall, Esq., Asst. U.S. Atty., for the government  
David Paul O'Brien, Pro Se

Court Room No. One,  
Federal Bldg. Boston, Mass.  
Wednesday, June 1, 1966.

(Jury impanelled)

*Opening Statement by Mr. Wall*

Mr. Wall: May it please the Court, members of the jury, this is the case of United States v. David Paul O'Brien. Mr. O'Brien is charged in a one-count indictment [fol. 8] with, on March 31, 1966, destroying, mutilating and changing a registration certificate issued by Local Board Number 18 of Framingham.

He is charged with willfully and knowingly destroying this certificate by burning.

The evidence in this case, ladies and gentlemen, is simple. The evidence will show that on March 31st, some time in the morning, outside the South Boston courthouse, Mr. O'Brien was present, with others, and did by burning destroy a registration certificate issued by Local Board Number 18.

The evidence will show that he knew that to destroy that certificate by burning was in violation of Federal law.

After you have heard all the witnesses in this case and after you have seen whatever physical evidence may be introduced, I shall again talk to you and consider with you the significance of the testimony and the physical evidence.

After that I shall ask you to return an appropriate verdict.

Thank you.

The Court: Call your witnesses.

Mr. Wall: The government calls Special Agent Thomas McInerney.

THOMAS L. MCINERNEY Sworn

*Direct Examination by Mr. Wall*

Q. Agent McInerney, will you state your full name, please, and your occupation? A. Thomas L. McInerney, Special Agent of the Federal Bureau of Investigation.

Q. And how long have you been so employed? A. Sixteen years.

Q. And were you so employed on March 31st of 1966? A. I was.

[fol. 9] Q. And during the course of your duties on that day were you in the vicinity of the South Boston courthouse? A. I was.

Q. How did you happen to be there? A. I was sent there by my supervisor.

Q. Was there anyone with you at that time? A. Yes, Agent Don Bassett.

Q. And what time did you arrive in the vicinity of the courthouse that morning? A. Approximately 8:40 a.m.

Q. And your specific assignment was what? A. To observe a group that was supposed to arrive there for trial, and indications that there was going to be draft card burning.

Q. And what did you observe upon your arrival at the location at 8:40? A. I observed a group of spectators in front of the Boston Municipal Court, also news media, television and newspaper men.

I saw a large gathering of spectators along with several groups of young men who approached the courthouse and

went up on the steps of the courthouse, facing the street, and each produced a card out of their pockets, and one produced a lantern.

And one of the members whom I was assigned to, a Mr. O'Brien, was there, and I witnessed him burning a card.

Q. Now, who assigned you to observe any particular person? A. Special Agent James Canty.

Q. He is your superior? A. He was the senior agent at that particular time.

Q. And when you were assigned to observe this individual, did you know him by name at the time? A. No, not by name.

Q. When did you learn the name of the individual? A. I learned afterwards, when Mr. Canty came over to me afterwards and told me who he was.

Q. And from the time you first arrived and were given [fol. 10] the assignment to observe Mr. O'Brien, did you in fact observe him on the courthouse steps? A. Yes, I did.

Q. And do you see that man in the courtroom to-day that you observed? A. I do.

Q. Will you point to him and tell us what he is wearing to-day, please? A. He is sitting there on the bench, with a brown coat, glasses, wavy hair.

Q. And that is the only man seated at this table (indicating)? A. Yes.

Mr. Wall: May the record reflect that the witness has identified the defendant.

Your Honor, may these photographs be marked as Government's Exhibits 1 through 4 for Identification?

The Court: Show them to the defendant.

Mr. Wall: Yes, sir (handing to defendant).

(A pause)

Mr. Wall: May they now be so marked, Your Honor?

The Court: Yes.

(Four photographs marked Government's Exhibits 1-A through 1-D for Identification)

Q. Agent McInerney, I show you Government's Exhibits 1-A through 1-D for Identification, and I ask you to examine them. A. (Complying) Yes, sir.

Q. Did you observe the persons and acts depicted therein? A. Yes, I did.

Q. And on what date and at what time? A. March 31st, at approximately 8:40 to 8:45.

Q. And are those exhibits, those photographs, a fair representation of the persons there depicted, as well as the circumstances and conditions at the time? A. They are.

Q. And is the defendant O'Brien in each of those photographs?

The Court: The photographs will speak for themselves.

Mr. Wall: Yes, sir.

The Witness: Yes, sir.

[fol. 11] Q. Now, will you describe to the jury, please, in detail, exactly what you saw O'Brien do on the steps of the courthouse. A. While Mr. O'Brien was up on the steps, I observed him reaching into his pocket and obtaining a card, a white card, the approximate size about two and a half by three.

And he, along with three others on the steps, ignited the card with that lantern being held by another individual, and it ignited and burned. And he held it up in his hand to the spectators.

And then he put it back, he put it in his pocket—I believe he put it in an envelope and put it in his pocket.

Q. Agent McInerney, how far were you from Mr. O'Brien at the time you observed these acts? A. I was approximately about fifteen or twenty feet.

Q. What next occurred? A. Well, as I was watching them burn there, a crowd started to surge forward, young men, and I could see that one of them was starting to swing and hitting one of the boys.

And then I saw Mr. O'Brien moving away from the crowd towards the entrance of the courthouse.

I immediately followed him and kept in back of him, and as we reached the door, I opened the door and I kind of pushed him in, and I identified myself as an FBI agent and I said, "Come and follow me".

Q. Was it your intention to place him under arrest at this time? A. No.

Q. What was your intention? A. To protect him from the crowd that was surging forward and fighting. It

seemed to me that there was going to be a riot, and trouble.

And I followed him into the corridor of the court and I told him to follow me. And we went approximately about fifty to seventy-five feet and I located a janitor's room in the courthouse.

[fol. 12] I opened it, and found no one in it. And I told him to come and follow me and to stay here and he would be protected.

And he did. And he was rather nervous, and he asked me if it would be all right to smoke, and I said, "Certainly."

Then I stayed there with him for a few minutes, and I could hear the crowd in the corridor. And I looked out and I could see the crowd there, and I figured there might be some trouble starting out there.

So I waited a few more minutes, and then I went out and got hold of Special Agent Don Bassett to come in to talk to—so he could talk to Mr. O'Brien.

And at that time I told Mr. O'Brien that he didn't have to talk to me, that I was a Special Agent of the Federal Bureau of Investigation, that anything he said could be used against him, that he had a right to consult an attorney, and if he couldn't afford one the Court would appoint one for him.

Q. And did you in fact interview him regarding the incident that had just occurred? A. I did.

Q. And will you give us his comments with regard to the incident that had just occurred? A. I asked him what he had done, what he had burned. He told me that he had burned a Selective Service certificate, and that he knew it was a violation of Federal law, but that he had his own beliefs and his own philosophy why he did it.

And he produced the charred remains of the Selective Service certificate, which he showed me, and it was in an envelope.

I asked him if it was all right if I photographed it and he said it was perfectly all right. And I called in Special Agent Berndt, who was with me, and we photographed the remains.



I asked him if I could have them, and he said, "No, I [fol. 13] am going to return these back to the Selective Service Board, Local Board 18 in Framingham".

Mr. Wall: Your Honor, may these be marked as Government's Exhibits 2-A and 2-B for Identification.

(Two photographs marked Government's Exhibits 2-A and 2-B for Identification)

(Mr. Wall shows the exhibits to the defendant)

Q. Agent McNerney, I show you Government's Exhibits 2-A and 2-B for Identification and ask you to examine them. And I ask you if those photographs are a fair representation of the document produced by Mr. O'Brien for photographing on March 31st? A. They are.

Q. And I ask you whose initials those are (indicating). A. Those are my initials and the date, which I placed there.

Q. Were these photographs taken in Mr. O'Brien's presence? A. They were.

Q. With his permission? A. Yes.

Q. By whom? A. By Special Agent Dale Berndt.

Mr. Wall: I have nothing further of this witness.

The Court: Mr. O'Brien, do you care to ask the witness any questions?

Mr. O'Brien: I don't want to contest any of the facts that were produced by Mr. McNerney, except for one thing.

*Cross-examination by Mr. O'Brien*

XQ. You mentioned the going in from the steps, with the crowd surging around, into the courtroom itself. This had nothing to do with the burning itself, but I would just like to bring out that I don't feel that I just walked in and you were there, and I would like to thank you for what did happen, because I think, by and large, it may have been my life that was saved, at least my safety.

I presume I have to ask a question rather than make a statement, so I will try and phrase it that way.

But wasn't it the fact—I don't remember in these circumstances [fol. 14] who it was, but it was one of the Agents from the FBI who actually pulled me out of the

crowd and into the courthouse, rather than my walking. This was my recollection. Is this not true? A. I didn't observe that.

XQ. Well, at any rate I would just like to thank you, or whoever it was that did this.

Mr. O'Brien: No further questions.

Mr. Wall: That is all.

The Court: You may step down.

Mr. Wall: The government calls Special Agent Donald Bassett.

DONALD A. BASSETT Sworn

*Direct Examination by Mr. Wall*

Q. Mr. Bassett, will you state your full name and occupation, please? A. Donald A. Bassett, Special Agent of the Federal Bureau of Investigation.

Q. And you were so employed on March 31, 1966? A. That is correct.

Q. And in the course of your duties on that date, were you in the vicinity of the South Boston courthouse? A. I was.

Q. What time did you arrive there? A. It was approximately 8:40 a.m.

Q. And in whose company? A. In the company of Special Agent McInerney.

Q. And your assignment was what? A. Our assignment was to observe the gathering which had been anticipated would take place in front of the municipal court in South Boston on that morning, specifically on the basis of word that we had received that there might be a draft card burning transpiring that morning.

Q. And were you assigned to watch a specific individual? A. Not at that point, no, sir.

[fol. 15] Q. Did that occur, that you were assigned to watch a specific individual? A. Yes, it did, later on during the morning.

Q. At what time did that assignment take place? A. The assignment took place approximately four to five minutes later, after the crowd had gathered in front of the courthouse, and as four individuals had positioned



themselves on the stairs of the courthouse for the apparent purpose of burning Selective Service documents.

Q. And do you see in the courtroom to-day the person you were assigned to observe? A. Yes, I do.

Q. Would you point to him, please, and tell us what he is wearing to-day? A. (Complying) the gentleman sitting at the second table out from the bench, wearing a brown coat and gold rimmed glasses, with long, wavy hair.

Mr. Wall: May the record reflect that the defendant has been identified by this witness.

Q. Did you know the defendant's name at that time, Agent Bassett? A. No, I did not.

Q. When was the first time you learned his name? A. Well, the first that I learned his name was as he identified himself during the interview subsequent to the action which took place.

Q. Now, would you tell the Court and the ladies and gentlemen of the jury exactly what you observed the defendant do on the steps of the courthouse, and the time you observed him do it? A. At approximately 8:47 a.m. I observed, from a position approximately twenty feet from the gentlemen who later identified himself as David Paul O'Brien, and three other persons on the courthouse stairs, I observed these people to burn cards which they had—.

Q. I am interested in what you observed Mr. O'Brien specifically doing. A. Yes. I observed him to burn a small white card, approximately two inches by three and a half inches.

[fol. 16] Q. Could you otherwise identify it at that time? A. No, I could not.

The Court: How did he burn it?

The Witness: He burned it by using a lantern, sir, what appeared to be a carbide lantern, which was being held by one of the four individuals in the group.

Q. And he put the card to the flame? A. Yes.

Q. What next occurred? A. I tried to move around to the left at that point to position myself in closer, to get a better look at what was going on. And in doing so, I wound up behind the four people on the stairs of the courthouse.

I still wasn't close enough to get a good look at the card itself, and a short time later a melee erupted, and it was difficult at that point to get any closer.

Q. What next occurred in relation to Mr. O'Brien? A. The last I saw of Mr. O'Brien he was caught up in the melee. I was pushed to the side—I should say to the center of the stair area, and crawled under a railing at that point.

And at that point I had lost him; I didn't know what had happened to him then. Of course, things were still confused, and there were a good many people in different positions on the stairs.

A short time later Special Agent McInerney came out of the courthouse proper and motioned to me to come inside. And at that time he told me that he had Mr. O'Brien in an isolated room in the courthouse.

Q. And what next happened? A. I followed Special Agent McInerney to the room where Mr. O'Brien was waiting for us. We went into the room, which was a custodian's room approximately 75 feet from the main entrance to the courthouse.

Mr. O'Brien introduced himself as being David O'Brien, and at that time I advised him that he didn't have to talk to me if he didn't want to, that anything he did say could [fol. 17] be used against him in a court of law, and that he was free to call an attorney or anyone else whom he so desired.

I told him that if he couldn't afford an attorney, the Court would appoint one for him.

Q. Did you have some conversation at that time with Mr. O'Brien with regard to the incident which had just taken place on the steps? A. Yes, I did.

Q. Would you relate that conversation, please? A. Mr. O'Brien stated that he, in the company of three other individuals, had burned his Selective Service registration certificate on the stairs of the South Boston municipal courthouse on that particular morning.

He stated also that he was aware at the time he burned the card that it was a violation of Federal law.

Q. Did he produce any document for you? A. Yes, he did. He produced what appeared to be the charred remains of a Selective Service card.

He was asked at that time if he would release these documents to the FBI to be held as evidence, and he stated that he did not wish to do so inasmuch as he wanted to return them to his local Selective Service board.

He was then asked if he minded if we photographed the documents, and he stated that he did not, and photographs were then made of the charred remains by Dale Berndt.

Q. In your presence? A. That is correct.

Q. And in Mr. O'Brien's presence? A. Yes.

Q. Now I ask you, did you observe these charred remains of the document at close range, personally? A. Yes, I did.

And what did you observe? Were you able to make out any writing or printing on the documents—well, was it one document or more? A. No, it was one document.

Q. Would you tell us what you observed on that document, or the remains of that document? A. Well, on one side I observed what I had learned from previous experience [fol. 18] ence to be the CNBA symbol. It appeared to be in ink, on the back of the document itself.

Also on the same side could be seen the printing signature at the top, or what appeared to be the top, of the card.

On the otherside appeared a portion of what I know from previous experience to be part of a block stamp on a Selective Service document.

Q. And do you recall the printing that was legible, the block stamp printing that was legible on the card that remained? A. I believe the "Local" could be seen, and also "Framingham". I don't recall any other printing right at this point, sir.

Mr. Wall: I have no further questions, your Honor.

The Court: Do you have any questions, Mr. O'Brien?

Mr. O'Brien: Yes, sir.

*Cross-examination by Mr. O'Brien*

XQ. Hello, Don. Once again I would simply like to ask, because I was pulled into the courthouse by someone who identified themselves as members of the FBI, and apparently it wasn't yourself or Mr. McInerney, if you do find out who he is, I wish you would—well, this is a ques-

tion, would you please give him by deepest thanks? A. I shall.

Mr. O'Brien: That is all.

Mr. Wall: Special Agent Berndt, please.

DALE A. BERNDT, Sworn

*Direct Examination by Mr. Wall*

Q. Agent Brandt, will you state your full name and occupation, please? A. Dale A. Brandt, Special Agent, Federal Bureau of Investigation.

Q. Would you spell your last name, please? A. B-r-a-n-d-t.

[fol. 19] Q. And on March 31, 1966 you were so employed? A. Correct.

Q. In the course of your duties were you in the vicinity for the South Boston courthouse? A. Correct.

Q. I show you Government's Exhibits 1-A through 1-D and ask you to examine them. A. (Complying) Yes,

Q. Do you recognize those? A. I do.

Q. What are they? A. These are photographs of four individuals I observed burning white cards on the steps of the South Boston municipal courthouse on March 31st. These are photographs taken by myself.

Q. You took those photographs? A. Yes.

Q. And are they a fair representation of the persons appearing therein, and the conditions and the locality at the time? A. They are.

Q. I now show you Government's Exhibits 2-A and 2-B and ask you to examine them, and I ask you if you recognize those? A. I do.

Q. What are they? A. These are photographs taken by myself on the same date, March 31, 1966, of a fragment of a card furnished by the defendant at that time.

Q. And do you see the man who furnished you those fragments in the courtroom to-day? A. Yes, he is sitting at the far desk, wearing a brown coat and steel rimmed glasses.

Q. And those photographs were taken in his presence and with his permission? A. They were.



Q. And is the matter reflected in those photographs a fair representation of what was produced by Mr. O'Brien for photographing? A. It is.

Mr. Wall: Your Honor, I ask that Government's Exhibits 1-A through 1-D and 2-A and 2-B for Identification be received in evidence.

The Court: Mr. O'Brien, you have a right to object [fol: 20] to their admission if you think there is anything about their authenticity that is in question.

Mr. O'Brien: No, they seem to be perfectly obvious.

The Court: All right, they may be received.

The Clerk: Government's Exhibits 1-A through 1-D marked for identification are now in evidence as Government's Exhibits 1-a through 1-D.

Government's Exhibits 2-A and 2-B for Identification are now in evidence as Government's Exhibits 2-a and 2-B.

(Government's Exhibits 1-A through 1-D and 2-A and 2-B for Identification received in evidence)

Mr. Wall: Your Honor, I have no further questions of this witness.

The Court: Do you have any questions, Mr. O'Brien?

Mr. O'Brien: No questions.

The Court: You may step down.

Mr. Wall: Your Honor, may this witness be excused permanently?

The Court: Yes.

Mr. Wall: The government calls Col. Paul Feeney.

PAUL F. FEENEY SWORN

*Direct Examination by Mr. Wall*

Q. Will you state your full name and occupation, please? A. Col. Paul F. Feeney, Deputy State Director of Selective Service.

Q. And at my request did you bring certain documents with you to-day? A. Yes, sir.

Q. And those are official records? A. Yes, sir.

Q. Regarding whom? A. David Paul O'Brien.

Q. And do you have legal custody of those records?  
A. Yes, I do, sir.

Q. And in addition to being official records, are they records that are kept in the regular and ordinary course of business? A. Yes, sir.

[fol. 21] Q. And is the regular course of business in keeping those records to make any memorandum in those records or any insertion of correspondence at the time that the acts reflected by the memorandum or correspondence is received or within a reasonable time thereafter?  
A. Yes, sir.

Q. And do those records reflect that Mr. O'Brien is in fact registered with the Selective Service System?  
A. Yes, they do, sir.

Q. And how do you determine that? A. This (indicating) is the registration certificate Form 1-A and it shows that David Paul O'Brien presented himself and submitted to registration on December 11, 1964.

Q. And did Mr. O'Brien fill out a classification questionnaire? A. Yes, he did, sir.

Q. On what date was that filled out? A. Mr. O'Brien signed and dated this December 19, 1964.

Q. And what do the records reflect regarding Mr. O'Brien's classification at the time he initially reported to the Local Board? A. The original classification given to him in January of 1966 was Class 2-S.

Q. And the reason for that was? A. There is evidence in the file received from Boston University that he was pursuing a full-time course of instruction at that school.

Q. Did there come a time when that classification was changed? A. Yes, sir.

Q. And what was the reason for that? A. The classification was changed to 1-A on April 6, 1966 after the Local Board received a letter from State Headquarters—may I read the letter?

The Court: No.

Q. The letter was from you? A. Yes, sir.

Q. And the information contained was what? A. With regard to his no longer attending school.

Q. And as a result of his no longer attending school,

[fol. 22] or no longer being a student, what action was taken? A. He was no longer eligible for his student deferment.

Q. Do you have the original Selective Service file there?

A. Yes, sir.

Q. And you also have a copy, a file copy; is that correct? A. A photostatic copy of the record, yes, sir.

Mr. Wall: Would your Honor indulge me for a moment, please?

The Court: Yes.

(A pause).

Q. Col. Feeney, may I have the Form 1-A, the registration card? (A pause). May I have the copy, please?

A. Yes, sir (handing).

Mr. Wall: Your Honor, I would like a copy of the registration card marked as Government's Exhibit 3 for Identification.

The Court: Is there any objection to a copy instead of the original?

Mr. O'Brien: No objection.

The Court: All right.

(Copy of registration card of David Paul O'Brien marked Government's Exhibit 3 for Identification).

Q. Col. Feeney, I hand you Government's Exhibit 3 for Identification. And that is, is it not, the registration card Form 1-A that you just handed me? A. Yes, sir.

Q. And I ask you, is that the basic document in the Selective Service form—? A. This is the basic record for each registrant.

Mr. Wall: Your Honor, I ask that this be received in evidence.

The Court: Let me see it, please. Mr. O'Brien, would you step up here, please, with counsel?

(Conference at the bench at which the following was recorded:

The Court: This is a purported registration certificate [fol. 23] made out by one David Paul O'Brien and signed by him. Now, there may be seventy-five



David O'Brien's, and you have a right to object to the admission of this evidence—

Mr. O'Brien: May I see it for a moment, please (examining)?

The Court: —as not being proven to be your particular registration certificate.

Mr. O'Brien: This is not the 1-A card.

Mr. Wall: No.

Mr. O'Brien: I was under the impression you said it was the 1-A card.

Mr. Wall: No, this is Form No. 1-A.

Mr. O'Brien: Oh, I see.

Mr. Wall: Which is a registration card.

Mr. O'Brien: Okay, your Honor.

The Court: Now, again I say to you, Mr. O'Brien, you do not have to supply evidence against yourself. You don't have to admit that that is your signature on there or that anything of that nature pertains to you in particular, because there may be several men with your same name and this may be one of another David Paul O'Brien.

So that if you object to this at this time, I will not receive it in evidence.

Mr. O'Brien: No, I have no objection. It has the correct address on it, it has my place of birth. I have no objection.

The Court: I think you ought to object to it at this stage of the evidence, because the government has to prove that that card is not only a registration certificate of one David Paul O'Brien, but that it is yours. And so far, they haven't done that.

Mr. O'Brien: I still have no objection.

[fol. 24] Mr. Wall: If your Honor deems fit, I can prove that, your Honor.

The Court: Well, it is part of your case. Here is a man without defense counsel.

Mr. Wall: Very well, your Honor. I will call the Local Board Clerk who can prove that.

The Court: I don't care what you do. But, Mr. O'Brien, you say that with full knowledge of what I am talking about you still have no objection to that going into evidence?

Mr. O'Brien: No objection, your Honor.

The Court: All right, I will receive it.

(Government's Exhibit 3 for Identification received in evidence).

Q. Col. Feeney, did you bring with you this morning at my request another document, not a part of the Selective Service record of Mr. O'Brien? I am referring to a blank registration certificate. A. Yes, sir (handing).

Mr. Wall: May I have this marked as Government's Exhibit 4 for Identification (showing to defendant).

(Blank registration certificate marked Government's Exhibit 4 for Identification).

Q. I hand you Government's Exhibit 4 for Identification, and that is the blank registration certificate that you just handed me, is it not? A. Yes.

Q. And that is Form No. 2? A. Right.

Q. And those certificates are used how within the Selective Service System? A. After the man registers, his card, his registration card, is sent to the Local Board having jurisdiction over his place of residence as furnished by him.

That Local Board will then, about the tenth of the following month, assign him a Selective Service number and enter him in their records.

They then prepare this registration certificate and mail [fol. 25] it to him as evidence that he has registered under the Universal Military Training and Service Act.

Q. Now, when you say that they prepare this registration certificate, what do they do to that blank certificate?

A. They will insert in the appropriate items his name, his Selective Service number, date of birth, place of birth and other identifying information, and it will show that he was duly registered on such-and-such a date, and the signature of the Local Board clerk.

Q. Is there a place on that card for his signature?

A. Yes, sir.

Q. The registrant's signature? A. At the end of the card.

Q. And on the other side of the blank card is there a place for the Local Board to stamp a self-identification

stamp? A. Yes, sir, there is a block for the Local Board's stamp.

Q. And it is standard operating procedure that the Local Board stamp its own identification on that block when it sends the card out? A. Yes, sir.

Mr. Wall: Your Honor, I offer Government's Exhibit No. 4 for Identification into evidence.

The Court: It may be received as a chalk.

The Clerk: Government's Exhibit 4 for Identification is received as Government's chalk.

Mr. Wall: I have no further questions, your Honor.

The Court: Do you have any questions, Mr. O'Brien?

Mr. O'Brien: Yes, your Honor.

*Cross-examination by Mr. O'Brien*

XQ. Mr. Feeney, do you have with you the complete file, my complete file from the Selective Service? A. Yes, sir.

XQ. Do you have in the file a letter sent from myself to the Local Board dated March 2nd?

[fol.26] Mr. Wall: Your Honor, may we approach the bench?

The Clerk: Surely.

(Conference at the bench at which the following was recorded:

Mr. Wall: Your Honor, the document to which the defendant now refers was not introduced by the government because the government feels it would prejudice his case. There is information in there, for instance, that he was doing—

The Court: Prejudice what case?

Mr. Wall: Prejudice the defendant's case. There is prejudicial information in there.

The Court: What are the contents. Let me see the letter, please.

(The Court examines the document).

The Court: Well, if the defendant wants this, I will allow it.

Mr. Wall: Very well, your Honor).

XQ. Would you please describe the nature of this letter that is sent from myself to Local Board No. 18, Framingham, dated March 2nd? A. Do you want me to read it?

The Court: If you wish, Mr. O'Brien, you can first offer it in evidence and it will be marked. Then you may read it to the jury yourself, or you may have it read.

Mr. Wall: May I substitute a copy?

The Court: You may substitute a copy if there is no objection.

Mr. O'Brien: I have no objection.

(Letter from defendant to Local Board 18 marked Defendant's Exhibit A).

The Court: Now you may either read that to the jury or you may pass it around amongst them, or you may do both.

Mr. O'Brien: I shall read it to the jury. This is a letter dated March 2nd from myself to Local Board No. [fol. 27] 18, Selective Service System, Framingham, Mass. It reads as follows: (reading).

"Fellow partners in humanity: I live by the principle of love. Therefore, I must inform you that I am unable to comply from this point on with the laws concerning the Selective Service System.

I take this action because I feel that it is the only moral course I can follow. I could never serve in the armed forces in any capacity for I consider the existence of the war machine the furthest step taken toward the demise of mankind, not only physically but morally.

I cannot accept a position of civilian alternative service in place of the military requirement you want me to perform.

This would amount to my being placed in a special category, and I am not special. This would be saying that there is a right to draft others in the killing machine, hate and suffering, to draft those who don't have special religious training and belief. I feel this right does not exist; it is a wrong.

I feel that I must commit my life to a more positive force than one of destruction. I must work for

a non-violent world. Good and moral gain does not come from militarism, but from a struggle against hate itself.

I cannot accept any classification you may give me, nor can I fill out any of the required forms.

I can no longer in good conscience carry what is called a draft card, for this is a recognition of government superiority over my conscience. That superiority does not exist.

I am returning my draft card to you with this letter"—

[fol. 28] that was my 2-S classification card, (continuing)

"I am sorry that the only communication that has taken place between us in the past has been official forms, and now we face one another in what might be thought of as a negative way. I am telling you that I cannot work with you in your official capacity.

But I think you will realize by my willingness to accept any consequences for this action that I do want to communicate with you. I hope that we can get to know and understand one another on a friendly basis some day.

I hope you will give me the opportunity to come in and talk with all of you in person in the near future.

With the hope that a communicative love shall prevail.

/s/ David O'Brien

March 2nd."

No further questions.

Mr. Wall: That is all your Honor.

The Court: You may step down.

Mr. Wall: I have nothing further, your Honor. The government rests.

The Court: We will take a short recess here. The jury is excused, and I would like to see Mr. Wall. and Mr. O'Brien at the bench.

(Jury excused).

(Conference at the bench at which the following was recorded:



The Court: Now, the government has presented its whole case, Mr. O'Brien, and I would like to find out from you what your desires are. You have the right to put on some evidence to contravert the government's claim that you burned your draft card. You have the right to take the stand under oath and [fol. 29] deny the charge, or to state anything else that you want to state that is in defense of your action.

Mr. O'Brien: Does this have to relate specifically to the facts, or can I put myself on the stand and make a statement as to why I committed that particular act?

The Court: You can do that if you want to, or you can refrain from taking the stand entirely and rest your case on the government's evidence.

Then later you will have two opportunities to speak and to state your reasons or anything else you want to say. One would come when you have the opportunity to argue to the jury, supposedly on the question of your guilt or innocence, but I will allow free range for you to expose your views on this matter. That would be one occasion.

The other occasion would be that in case you were found guilty, before I would impose any sentence you would then have an opportunity to address the Court on your reasons for so doing. But that would be in the absence of the jury.

Mr. O'Brien: I see.

The Court: So you think it over for a few minutes.

Mr. O'Brien: Well, I think it would probably be best, then, if at the time of making an argument, which I believe is term you used—I shall not have a defense; I don't contest the facts. There are one or two things which they presented which are not correct, but they are rather pedantic, and I don't wish to be pendantic about it.

I don't contest the fact that I did burn the card.

The Court: Then if you want to confine your remarks to your argument to the jury, then I would suggest that you talk it over with your friends and

[fol. 30] that you rest, now that the government has rested, and then, immediately thereafter, will come the arguments. And in that case, you will not be sworn.

Mr. O'Brien: That would be, then, right after the recess?

The Court: Right after the recess, a few minutes after.

Mr. O'Brien: When is the recess over?

The Court: Generally it would be ten to fifteen minutes, but I have to see other counsel. If you desire a longer time, I will give it to you.

Mr. O'Brien: Could I have until half past the hour?

The Court: Surely. We will recess until 11:30, or thereabouts.

Mr. O'Brien: Thank you very much.

The Court: Now, you understand the situation?

Mr. O'Brien: Yes, your Honor.

The Court: And after you talk it over with your friends, if you want to come up here I will be glad to talk to you about it and direct your strategy.

But you have those three opportunities, one, to take the stand and say under oath whatever you want to say; two, your argument to the jury, which will not be under oath, and in which I will give you some latitude, although strictly speaking your argument should be directed to the question of your guilt or non-guilt; then three would be in case you are found guilty you would have an opportunity to address the Court before sentence was pronounced. And that would be in the absence of the jury.

As I understand it, you would rather take number two.

Mr. O'Brien: Yes, sir.

[fol. 31] The Court: All right.

Mr. O'Brien: Thank you very much.

(Recess).

(Conference at the bench at which the following was recorded:



The Court: Just to check with you, do I understand that you are going to rest now?

Mr. O'Brien: Yes.

The Court: And immediately thereafter you will make your argument to the jury.

Mr. O'Brien: Yes. I have one question. Is the government going to also make a summation?

The Court: They can, or they can waive it if they see fit. The chances are that they will, but they will make it after you.

Mr. O'Brien: They would make it after mine? I see. Thank you very much.)

The Court: Now, members of the jury, I have ascertained that the government having rested the defendant is also going to rest, and will put on no evidence.

That is his right, as I shall explain to you later in my charge to you.

So now Mr. O'Brien will argue his case to you, and after that we will hear from the government and then I will charge you on the law.

All right, Mr. O'Brien.

Mr. O'Brien: Thank you. Ladies and gentlemen of the jury, we are now in part of what is called my trial, but I think there is something larger than that here; I think in a sense we are all on trial here to-day.

For I think that life is basically a series of confrontations, and there is necessity on every individual's part to make a choice in these confrontations.

Whether it is simply to choose between living in the cities or the suburbs, or one job or another, or the basic [fol. 32] moral choice of death or trying to sustain life, these are all choices that we have to make.

And I have gone through a much more difficult trial than to-day's, that I waged within myself, as to what position I would take on the confrontation between death and sustaining life.

It began when I was 18 and registered with the Selective Service System.

I had to make a choice of whether or not to register, and I registered.

I regretted it later that I did, but I did, I cooperated with what I considered to be intrinsically immoral, wrong, a system that sustains death rather than life.

I then thought that I would try to get a 1-0 classification, a conscientious objector's classification from the government, so that I would do two years of alternative services rather than go into the armed forces.

And I went to see counselors and so on, to know the legal aspects of how to get a conscientious objector's rating, and I was all set to file, and still going through a great deal of inner turmoil, a very difficult thing to decide, and I decided that I could not accept a 1-0 classification.

I could not go along with the system: I had to refuse to cooperate with what I considered to be evil.

So I returned, on March 2nd of this year, with the letter which I earlier read to you, my 2-S classification card, informing the Local Board that I was not going to cooperate with it, that I couldn't kill people.

I am a pacifist and as such I cannot kill, and I would not cooperate.

I later began to feel that there is necessity, not only to personally not kill, but to try to urge others to take this action, to urge other people to refuse to cooperate with murder.

[fol. 33] So I decided to publicly burn my draft card, hopefully so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of to-day, to hopefully consider my position.

And I don't contest the fact that I did burn my draft card, because I did.

It is something that I felt I had to do, because I think we are basically living in a culture to-day, a society that is basically violent, it is basically a plagued society, plagued not only by wars, but by the basic inability on the part of people to look at other people as human beings, the inability to feel that we can live and love one another, and I think we can.

We tend to look on other people as abstractions, masses, mass education, mass communication.

We look upon things in terms of masses of working men, masses of capitalists on Wall Street, masses of people in the factories.

These are all individual people, and I think this is something that has to be realized. So that when you are shooting at someone, he is not merely a person with another uniform on, he is a human being. This is something that has to be realized.

There are a lot of philosophers in the last twenty years who have expressed it by saying that something that has been killed in us is the ability to feel that if you talk to another person as a person you can elicit a human response.

Many people feel that you can no longer elicit that human response. I don't think that is true.

Sometimes I am pessimistic and feel that you can't talk to this human being, this abstraction. But I feel that basically you can get a human response from other people.

And it is upon this basis that I feel I am approaching you now, feeling that you are not twelve people sitting here, and abstract jury that can decide one way or the other what happens to me, but you are human beings.

And the important thing is that I want to reach you as people and make you understand that people can be reached this way.

So in this sense I think we are all on trial to-day. We all have to decide one way or the other what we want to do, whether we are going to accept death or whether we will fight to sustain life.

I think it is highly unfortunate that we are having to reach one another with this bar between us, so that I am in one legal position and you are in another legal position.

No matter what the verdict reached by this jury, by this group of people, individuals, I sincerely hope that we can afterwards get to know one another as individuals, that we can get together at another time and sit down together and understand one another, and realize that I am not an abstraction that you saw on television or read about in the newspapers, or standing before you now in

court, but I am a human being and you are also. It is something I have to face.

Thank you.

Mr. Wall: Ladies and gentlemen, Mr. O'Brien presents your alternative, the issue of this trial apparently, as a choice between accepting death and sustaining life.

Well, I submit that is not the choice here. The choice is whether to burn a draft card, with knowledge that it was against the law, or not to.

And I submit that the evidence has been overwhelming. I won't go into the evidence, including the eye witness testimony, the photographs, the admission of Mr. O'Brien that he did in fact burn the draft card, and that he burned it with full knowledge that it was a violation of Federal law.

[fol. 35] Mr. O'Brien in his letter to the draft board says that the government has no superiority over his conscience. The government does not contend that it has superiority over his conscience.

Over his acts, however, some of his acts, a government can have and must have superiority.

The government would not tell Mr. O'Brien what to believe. The government would not seek to restrain Mr. O'Brien from influencing others to his way of thinking.

The government would and must, however, see that Mr. O'Brien as well as everyone else obeys the duly constituted laws that are passed by the legislature of this country, the members of which are elected—by whom? By the people.

He is charged, ladies and gentlemen, in violation of the statute, with knowingly burning his draft card. He submits—at least, that is my interpretation, and of course you are entitled to make your own interpretation—he submits that the military is morally wrong, or military activity is morally wrong, and therefore he cannot cooperate in any sense.

But if the government had no control over anyone's activities just because they said in conscience that is bad, I ask you to imagine the results of that.

The rich man says the graduate income tax is immoral and in good conscience he cannot subscribe to it. The poor

man says the sales tax is immoral and he will not obey it.

The jaywalker says, "That law is ridiculous, and I won't obey it.

The holdup man and murderer says, "The bank has plenty of money, they are covered by the insurance companies, I have a moral right, I am a poor man and my kids are starving, I have a moral right to go in there and if they won't give me what I have a right to have, to kill to get it".

[fol. 36] If we follow Mr. O'Brien's logic, those other conclusions must necessarily follow.

My point is, ladies and gentlemen, that you as jurors are bound by the law, as well as Mr. O'Brien. You are bound by the law as it will be presented to you by his Honor, and he will charge you to that effect.

You are bound by your oath as jurors to decide—.

The Court: Mr. Wall, I will instruct them on their duties.

Mr. Wall: Pardon, your Honor?

The Court: I will instruct them on their legal duties.

Mr. Wall: Yes, sir. I ask you, ladies and gentlemen, in considering the verdict to consider the facts. Of course, you judge the facts and they have been presented for your consideration. And to consider the law as his Honor presents it to you.

Then without passion against or sympathy for the defendant, to decide that issue, innocence or guilt of the crime charged.

Thank you.

### *Charge to the Jury*

The Court: Mr. Foreman, and ladies and gentlemen of the jury, this is your first case, and it is a criminal case, in which this defendant is charged with violating a statute.

And that statute, in brief, says that any person who knowingly destroys, knowingly mutilates, or in any manner changes, any certificate of notation such as a draft card shall be found guilty of a crime.



That is the issue that we are trying, whether or not Mr. O'Brien knowingly burned his draft card.

Now, in a court of law, the jury functions best when it finds the facts from the evidence which has been submitted to it, and such logical inferences as are to be drawn from it and then follows the law as the Court gives the law. [fol. 37] While I have a right to comment on the facts, I do not intend to do so. I think they are clear.

And in return, I am going to ask you not to interpret the law in any manner other than as I give it to you.

If I make a mistake in the law as I give it to you, there is a court above that will correct me. If you make a mistake in the facts, there is nobody that can correct you.

The verdict that you reach must be unanimous, and you should arrive at it by conscientious consideration of the evidence that you have heard, to establish the facts in the case, and then reach your verdict in accordance with the law as I give it to you.

Now, Mr. O'Brien did not take the stand in his own defense, and that was, as I said to you, his perfect right. He has a right to stand mute, and to give no evidence whatsoever, and to stand or fall on the government's case.

The government is bound to prove their charge beyond a reasonable doubt. And I will now read something to you which has received the approbation of many, many courts:

(reading)

"In the first place, the law presumes that persons charged with crime are innocent"—

that is the presumption of innocence—

—"until they are proven by competent evidence to be guilty. To the benefit of this presumption of innocence the defendant is entitled, and this presumption stands as his sufficient protection unless it has been removed by evidence proving his guilt beyond a reasonable doubt.

The burden is on the government, before the defendant can be convicted, of establishing every essential element of the crime charged beyond a reasonable doubt.

A reasonable doubt of guilt is a doubt growing reasonably out of the evidence, or the lack of it. [fol. 38] It is not a captious doubt, not a doubt engendered merely by sympathy for the unfortunate position of the defendant, or a dislike on your part to accept the responsibility of convicting a fellow man.

If having weighed the evidence on both sides you reach the conclusion that the defendant is guilty, to that degree of certainty which would lead you to act on the faith of it in the most important and critical affairs of your life, you may properly convict him.

Proof beyond a reasonable doubt is not proof to a mathematical demonstration. It is not proof beyond the possibility of mistake."

Now, the crime charged is the burning of a draft card—that is in lay language—knowingly or intentionally. So that the elements of this crime which the government must prove beyond a reasonable doubt are, one, that the defendant O'Brien burned his draft card and two, that he did it intentionally knowing that it was a wrongful act.

You have heard the evidence which has been presented to you, and it is up to you to say whether the government has established their burden of proof.

We are not concerned here with anything other than this statute which prohibits the burning or mutilating of a draft card.

The rights of O'Brien or anyone else to hold beliefs which are contrary to our own is not in question. They have such rights.

The right of free speech or assembly in which to espouse those beliefs to the public are guaranteed by our Constitution. Those are not in issue here.

It makes no difference whether your philosophy of life is the same as O'Brien's or not; he has a right to his own thoughts in the matter.

But when the law says—and it is in aid of the war effort—that certain persons must register and carry draft [fol. 39] cards and not mutilate them, then that is the law. I have previously ruled upon some motions that raised that legal question in this case.

And when the Congress has spoken, and there seems to be good basis for what they write in as our statute law, then that is the law of the land.

So if the government has proven to your satisfaction beyond a reasonable doubt that O'Brien on March 31st burned his draft card knowingly and intentionally, then you would be justified in finding him guilty.

If on the other hand you are not satisfied with the burden of proof on the part of the government, then you would be entitled to say that he was not guilty.

The clerk has said to you that in reaching your verdict you will say whether the man is guilty, and if he is not guilty you will say and no more. That is a simple question of fact for you to decide. The question of the possible meting out of a sentence is not yours to consider.

I will now leave the case in your hands, and the Marshal will shortly take you to lunch, and when you are ready to report your verdict I will be ready to receive it.

Is there any suggestion of errors or omissions?

Mr. Wall: Not on the part of the government, your Honor.

The Court: Mr. O'Brien, is there anything you want me to say that I didn't say?

Mr. O'Brien: No, thank you, your Honor.

The Court: All right, the Court will recess.

[fol. 40] (The jury returned with a verdict of guilty)

(Conference at the bench at which the following was recorded:

The Court: Now I have to dispose of your case, Mr. O'Brien. Would you care to have your father up here to hear what I have to say?

Mr. O'Brien: Yes, your Honor.

(Mr. O'Brien, Sr. is brought to the bench)

The Court: It is the sad duty of the Court now to pass sentence in this case. You are 19 years of age, aren't you?

Mr. O'Brien: Yes, your Honor.

The Court: Well, the Court can sentence you under an Act which might be fore your benefit. It is known as the Youth Correction Act, under which I

sentence you to the custody of the Attorney General for no period of time.

And under the Youth Correction Act, they have a method of getting to these cases, and they have a wide power of releasing you whenever they feel that you are ready to be release.

The unfortunate part is this, that they can keep you for six years. The statute under which you have been convicted provides for a limit of five years.

So that I cannot sentence you under the Youth Correction Act without your permission because of the fact that it might be a longer term than the five years provided under the statute for burning the card.

I do want to point out to you, however, certain features of the Youth Correction Act. The Attorney General can release you as soon as he thinks you are ready to be released.

It might occur in thirty days; it might occur in [fol. 41] twenty-four hours. But it is all according to a formula they have set up pretty much for your benefit.

And if you are sentenced under that Act, one of the features is that if you go through with the period of whenever they release you—and I think there is another probationary period for a year—then the entire offense is wiped out.

So that in the long run this is pretty much a choice with you. The Act provides that where the youth offender has been placed on probation—there is a provision that after you have served some period of time they can put you out on probation—where the youth offender has been placed on probation, the Court may thereafter in its discretion unconditionally discharge said youth offender from probation prior to the expiration of the maximum period of probation, which discharge shall automatically set aside the conviction, and the Court shall issue to the youth offender a certificate to that effect.

Now, there are several other sections of the statute, but the statute that I refer to says that if the Court



shall find that the convicted person is a youth offender, and the offense is punishable by imprisonment under an applicable provision of law, the Court may, in lieu of the penalty of imprisonment—that is the five years provided by law—sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division—that is not discharged by me, but by the Division to which you will be sent.

I have given you the gist of the thing and now I want to show you what the alternatives are that I have. Under the statute I can sentence you to up to five years, to be served in a common ordinary cell-  
[fol. 42] block, or I can put you on probation, or I can do a little bit of both.

Probation, however, would not be effective to my way of thinking—and this is what has been collected from other courts in the country—unless you realized the offense which you had committed, and made amends, or took some steps to amend the matter.

In other words, specifically, you would have to apply for a new draft card, and upon its receipt carry it with you at all times.

And you would have to do certain other things that the ordinary probationer has to do, disassociate yourself from certain activities and otherwise lead a normal life.

In your own case I think it would be better if you accepted probation and went home to live with your parents and disassociated yourself from this movement.

However, I can't compel that and I am only suggesting, if you were to get probation, what would be the terms of it.

Now, your attitude has been very consistently a stubborn one, stubborn beyond your intelligence as I see it, and if none of these alternatives are going to appeal to you, that is, probation under certain proper terms, or commitment under the Youth Correction Act, where people who are trained to that end could



help you, if you are not interested in those things, then I can't do anything for you except to exercise my prerogative.

I am prepared to dispose of the case now, but I don't want you necessarily to make a rapid decision. Maybe if you discussed it with your father, or went to Mr. Randall and pointed out these sections to him, you could make up your mind what you would like to have me do.

[fol. 43] Mr. O'Brien: At this time I can only say that if there were stipulations that I would have to carry a new draft card, or submit to induction, or in any way cooperate with the Selective Service—

The Court: I said nothing about submitting to induction. Have you been up for induction yet?

Mr. O'Brien: No. I was called up to go for my physical, which I didn't do. But if there were a stipulation, as stated, to carry a new draft card, I couldn't in good conscience do that.

The Court: I think you are making an awful mistake, because you can accomplish the purpose of your organization without defying the law or burning your draft card.

That seems to be such a silly gesture. What is to be gained by it? If you want to express your views on Vietnam, or war in general, no one wants to stop you from that.

But when you go beyond that, there is nothing I can do to help. And I want to be helpful. Do you feel that there is anyone you could talk to, whose counsel you would listen to?

Mr. O'Brien: Yes.

The Court: Who would that be?

Mr. O'Brien. Several friends I have, people I associate with generally.

The Court: Are they the people you are associated with in this youth movement, or whatever it is?

Mr. O'Brien: It is the Committee for Non-violent Action. It is not a youth movement.

The Court: Do you expect that they can give you good advice?

Mr. O'Brien: Well, in the final analysis I suppose it does come down to my decision, and I know that [fol. 44] my conscience simply would not allow me to carry a draft card.

The Court: Well, this committee probably were advising you not to sign the bail bond that time when you didn't want to sign it.

Mr. O'Brien: No, they didn't advise me to do that. They haven't advised me to do anything.

The Court: Why do you want to waste several years of your life in jail?

Mr. O'Brien: I don't want to go to jail.

The Court: You have no alternative. I have a sworn duty to perform. The jury says that you violated the statute, and you say you won't change, even to the extent of carrying a draft card.

Mr. O'Brien Senior: May I ask a question?

The Court: Yes.

Mr. O'Brien Senior: What was the understanding under the Youth Correction Act? Would he have any particular requirements in being sentenced under that?

The Court: Oh, yes. He has to consent to that.

Mr. O'Brien Senior: Yes, he consents to that, but other than that are there any stipulations as to what he must do?

The Court: He will be committed somewhere, but they will commit him, as it says, for treatment and supervision. I have handled several other cases where they have done good work for people.

There is another section that I could sentence him under. It says that if the Court desires additional information as to whether a youth offender would derive benefit from treatment under that section, then I can commit him to their custody for sixty days, and from past experience they will then ask for an extension of thirty days which would make it ninety days [fol. 45] until I would have their recommendation as to whether he would be subject to treatment.

But again, I can't sentence him under that provision unless he agrees to it.

(A pause)

You are at the threshold of what might be a horrible mistake. I am willing to help you consistent with my duty, but I can't go beyond it. But there will be a jail sentence unless there is a sentence under the Youth Correction Act, or unless you convince me that probation will do you some good. And that burden is on you.

Mr. O'Brien: Well, I can only state that I consider that I did what I considered to be a morally correct action.

The Court: It may have been moral, but, it was illegal.

Mr. O'Brien Senior: How do you feel about the youth service alternative, where you are not bound by anything permanently as to counsel and approach?

The Court: What is it going to profit this youth organization to have you go to jail?

Mr. O'Brien: It won't profit the organization.

The Court: How is it going to help you to be a martyr to this thing?

Mr. O'Brien: I don't want to be a martyr.

The Court: Well, don't forget that there are a lot of situations where one man has to have his head cut off, and a lot of his good friends will push him forward to have it cut off.

Mr. O'Brien: Well, I am not being pushed.

The Court: Because you are a minor and without counsel, I am not going to press you on this. I will continue this matter for ten days if you want me to, and you may consult with your friends.

[fol. 46] But I would suggest that you consult with someone other than friends of this movement so as to get views that are not warped necessarily by their strong allegiance to a cause.

Consult the pastor of your church, consult Mr. Randall, and your father. I will be glad to have you do it.

On the other hand, if you have made up your mind to be a martyr, you might as well start being one today.

Mr. O'Brien: Well, I mean I really don't know that much about the Youth Correctional Act.

The Court: That is why I have been citing you Section 5010 of the Youth Correction Act. The whole thing is there.

I don't want to be advising you as to what it means. You can consult Mr. Randall or any other attorney and they can easily read it and see what it does mean.

But it simply means that it recognizes, where a youth commits an indiscretion which is a crime, that there is a provision whereby, if he has a willing heart to undo what he has done that is wrong, they will work along with him, and give him guidance and so forth.

It is a help to a great many young men.

Mr. O'Brien: I am perfectly willing to work with any one, but I simply don't consider that I did anything wrong.

The Court: Well, you just heard the jury say you did.

Mr. O'Brien: I suppose we are in disagreement, then.

Mr. O'Brien Senior: Do you feel the Youth Correctional Act would be a possibility?

Mr. O'Brien: I really don't know. I can only state that putting it in terms of making amends for wrong [fol. 47] deeds, I don't see how I can make amends for wrong deeds if I didn't commit the wrong deeds.

I burned my draft card, yes, but I don't consider that to be an incorrect act.

Mr. O'Brien Senior: I don't think that is in issue here. The issue here is, will you agree to work with these people, to share their viewpoints and counsel?

The Court: They can hold you up to six years. That is why it has to be a voluntary act. If you are convinced that you are going to get nothing from their guidance—

Mr. O'Brien: No, I am not convinced of that at all. Every experience is of great value. I have not yet had an experience that I didn't gain a great deal from it.

My only point is that if I have to come around to the point of saying what I did was incorrect, and I

am willing to make amends for having burned my draft card, or something of this nature, to be released within six years possibly, it becomes an impossible task because I don't consider that I did anything that was incorrect.

So I am really unfamiliar and unable to state one way or the other what I feel about it because I don't really know what it entails.

The Court: Much of its treatment, I imagine is psychiatric treatment. I don't know too much about it, but if you enter into it with a heart and a willingness to be helped by these people who are specialists in their line, you can't lose much by it.

You stand a danger of doing another year beyond the maximum five years imposed by the statute, but that is only providing you are such a hardened case that they can't do anything with you.

[fol. 48] Mr. O'Brien: Well, I certainly am not a hardened criminal.

The Court: I didn't say a hardened criminal. I said a hardened case.

They are not a probation system, although when they feel you are ready for discharge, it could occur early. I have nothing to say about it; I just hand you over to them.

Mr. O'Brien Senior: I think it is a possibility that the Court offers you a lot of options, David.

Mr. O'Brien: Basically I am not in favor of either one.

Mr. O'Brien Senior: Well, we are not in a position to settle that, but I think the options that have been presented, it seems to me it is a very flexible way to approach this and to approach the future. And it isn't forcing anything on you except to agree to work and talk with these people.

Mr. O'Brien: Well, that I certainly would agree to; that is no problem.

Mr. O'Brien Senior: In my position this seems a very favorable option, one in which you could only profit.

The Court: Maybe if you were removed from the influence of the friends of yours, as you are going to



be anyway one way or the other, you would be able to think this thing out more clearly as it stands in relation to your personal life from now into the future.

Self-examination of your own soul is what you need.

Mr. O'Brien: Well, I am doing that constantly.

The Court: But now you are facing what is sometimes called the dough dish; you have to go one way or the other.

[fol. 49] If you wish, I will give you a couple of weeks, until a week from Monday, to think this thing out, and seek what counsel you can.

And I will be glad to loan you this book so that you can read yourself what the Youth Correction Act is.

Mr. O'Brien: Fine.

The Court: It is the property of the United States Government, so we will both be indicted if you don't return it.

I think I will do that, I will continue your case until a week from Monday. Would you like to borrow this book?

Mr. O'Brien: Certainly.

The Court: All right.

Mr. Wall: Your Honor, I can see that he gets the appropriate statute without imposing on your Honor to give up your book.

The Court: Do you have it?

Mr. Wall: Yes, sir. I will see that he gets a copy of the entire statute. I will have it typed and mail it to him. Is that satisfactory?

The Court: You don't have a loose-leaf now?

Mr. Wall: I will check the office, but in any case he will have it within two days.

The Court: Oh, well, I will let him have this book. There may be some things—this is for legalistic thinking, and in case of any doubt don't come back to me. Go and see Mr. Randall. I don't want to interpret this for you.

I will let you take this book, and I will mark the section that it is in (marking). I see that this isn't the property of the United States; it is my own personal book. But I will still loan it to you.

Mr. O'Brien: Thank you.

[fol. 50] The Court: I am not giving you an autographed copy because I didn't write it.

I will continue this case on the same bail until a week from Monday.

Mr. Wall: Very well, your Honor.

Mr. O'Brien: What time would that be during the day.

The Court: That will be at 2:00 o'clock.

Mr. O'Brien: Thank you.

Mr. O'Brien Senior: Thank you very much, your Honor.

Friday, July 1, 1966.

The Clerk: Criminal No. 66-91, United States v. David Paul O'Brien.

Mr. Wall: May it please the Court, this matter comes before the Court for sentencing after a jury trial and a conviction of the defendant for violating the Selective Service laws.

The government, if your Honor desires, is prepared to make a recommendation.

Mr. Wall: Your Honor, this defendant has consistently violated the Selective Service laws, as illustrated not only by his burning of the draft card, but by his wilfull failure to report for physical examination, on May 26th of this year, also a felony violation.

He has repeatedly stated that if called up for induction he would refuse to comply with that order.

Should the defendant in this court express a desire to now comply with the law, of course the government would recommend a suspended sentence and probation.

All he has said up to this moment, however, indicates otherwise.

[fol. 51] Under the circumstances, your Honor, the government feels that the integrity of the Selective Service System, as well as the deterrent effect on others who

might be similarly disposed, requires in this instance a period of incarceration.

The government's recommendation is two years imprisonment.

The Court: Mr. O'Brien, you and I and your father had a talk, and I loaned you a book so that you might understand the possibilities of probation in your case, the possibilities of commitment under the Youth Correction Act, and the possibilities of commitment as a straight offender, as the United States has recommended.

Do I understand that your attitude is the same as you last expressed it, that you will not voluntarily seek to get a new card and carry it with you?

Mr. O'Brien: In good conscience I don't feel that I can do that, your Honor.

The Court: You don't feel that you can? You understand that you are now closing the door to my giving you probation?

Mr. O'Brien: Yes, sir.

The Court: All right. Have you anything to say further before sentence is pronounced?

Mr. O'Brien: Well, I met you outside and I gave you a copy—

The Court: Yes, that is right.

Mr. O'Brien: (Reading)

"I am standing in court to-day to be sentenced for the destruction of my draft card. This in itself is a very insignificant act, but for me it symbolizes the choice in my life to work for a positive value rather than cooperating with the system that indiscriminately kills, maims and tortures.

I hope that this symbol will cause others to reevaluate [fol. 52] at their thoughts on the military, the draft, and other institutions, and to recognize and overcome the lack of human understanding and love that pervades the world to-day.

I feel that the draft card burning symbolizes my choice to work for the betterment of our society in a very radical way, radical in that all our motivations, all our actions, all our beliefs must be reexamined and those that are incompatible with the well-being

of the individual and those that deny love must be changed.

The horrors of a war are so great that I am mystified that so many people, even those who have fought in wars, seem unable to feel any compassion for those who are affected. The cry we have heard in the past to bomb Hanoi with its thousands of innocents has been acted upon, and now the same people cheer over the cries and screams of the victims. I cannot understand how the warriors fail to see in this the rape of their own sensitivity. There is no more true saying than that war makes us all victims. But must we all be executioners as well? My choice is to neither murder, nor plunder, nor torture, nor to support these evils. War in the name of freedom, or peace, or any humane philosophy, is a mockery of those values. There is no peace, there is no freedom, in a shattered body. The values of which America is proud are incompatible with the wars that some claim to protect them.

My choice is to work for these goals, to work for these values in a way that is consistent with them. My choice is to refuse to harm for humanity, to kill for peace, or to coerce for freedom. I hope that you will face this confrontation and choose between death and sustaining life".

[fol. 53] The Court: I have received many letters with regard to your case, asking me to reconsider my sentence.

Well, of course, I have uttered no sentence, but I think you know what it is going to be, because I have discussed this with you and your father, and I have given you every opportunity to recognize and try to correct your violation of the law.

I haven't asked you to give up your beliefs, and you have slammed the door in my face.

So I am going to sentence you to the custody of the Attorney General under Section 5010-B of the Youth Correction Act, and there you will receive all the attention that an intelligent government will give to a case like yours.

Your act is a defiance of the law, is a continuing defiance of the law, and whether we like it or not, this must be a government of law, and not individual opinions.

Mr. Marshal, the defendant is now in your custody. And Mr. O'Brien, will you hand my book to the deputy.

Mrs. Irene R. Johnson: I must rise to protest this terrible miscarriage of justice. You should be sentencing me—

The Court: I can't hear you.

Mrs. Johnson: You should be sentencing me for this, for my failures, which have forced this wonderful young man—

The Court: Wait a minute. I want the defendant here.

(The defendant is returned to the courtroom)

Mrs. Johnson: For you and me and for all mankind—

The Court: Please. Who are you?

Mrs. Johnson: I am Irene Johnson.

The Court: And what is your complaint?

Mrs. Johnson: I have a statement to read.

The Court: Will you step up here, please? I have difficulty hearing you. (Mrs. Johnson goes to the bench) Now, what is it you want to say to me?

[fol. 54] Mrs. Johnson: Your Honor, I must rise to protest this terrible miscarriage of justice. You should be sentencing me for my failures, which have forced this wonderful young man, as others like him, to take this stand for me—

The Court: I will not hear from you further. I will order you to sit down. You are not a party to this case.

Mr. O'Brien, under the rules of our court, particularly Rule 37 of the Rules of Criminal Procedure, you have ten days to appeal this sentence.

If you so request, the Court will prepare and file forthwith a notice of your appeal.

Mr. O'Brien: I have no desire to appeal.

The Court: All right. If you change your mind within ten days, you may apply again to this Court.

The Court will recess.





## GOVERNMENT EXHIBIT NO. 1 B



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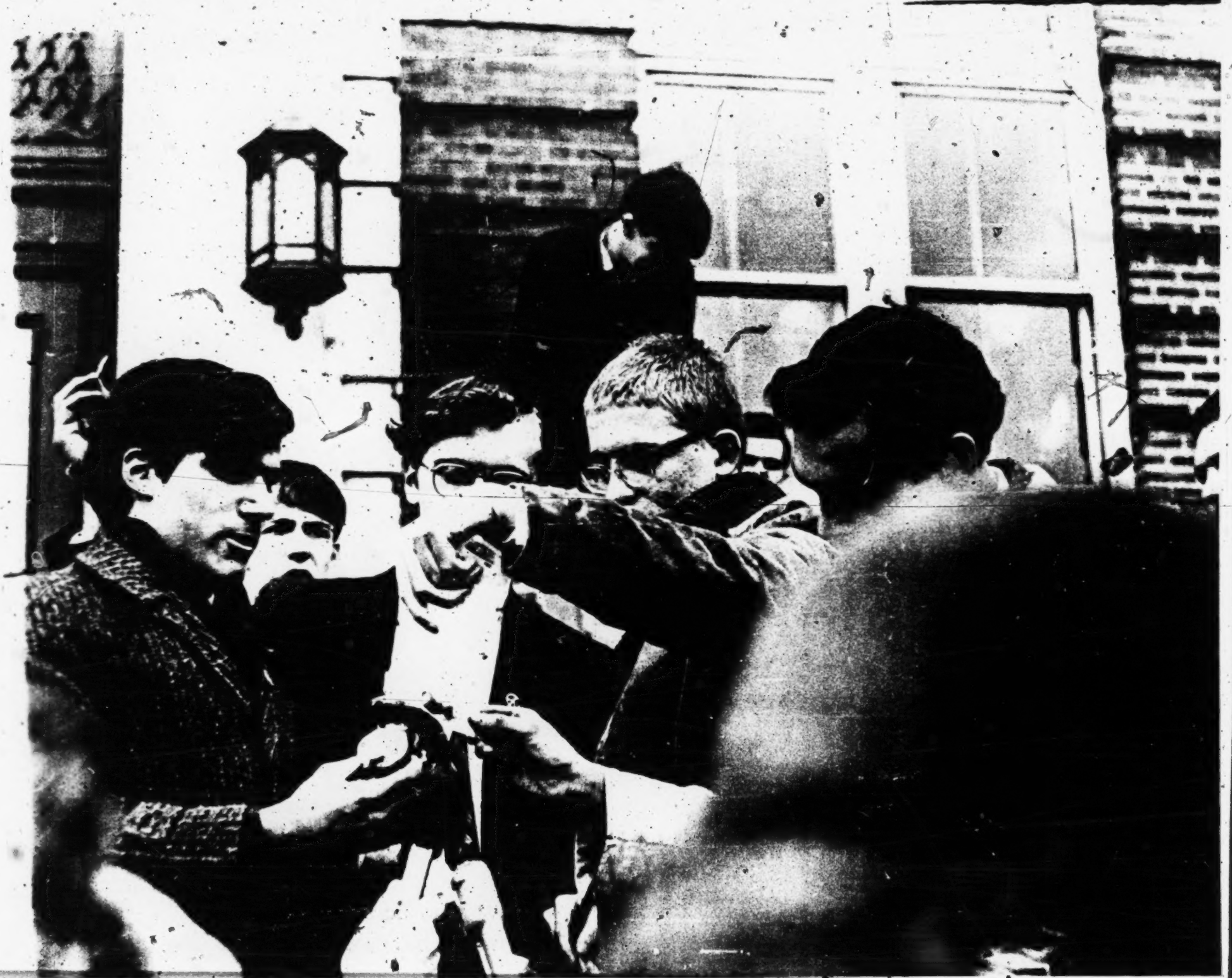
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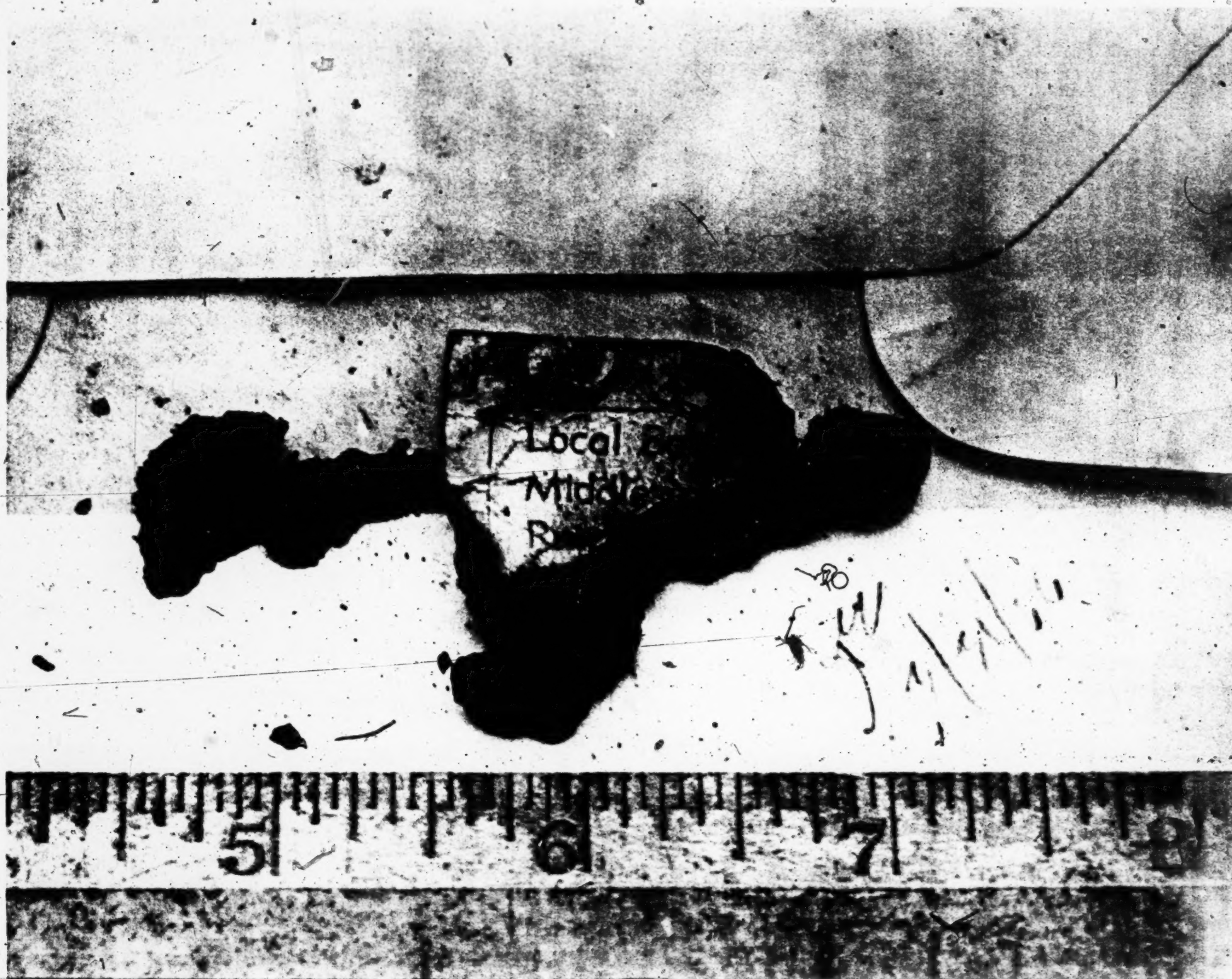


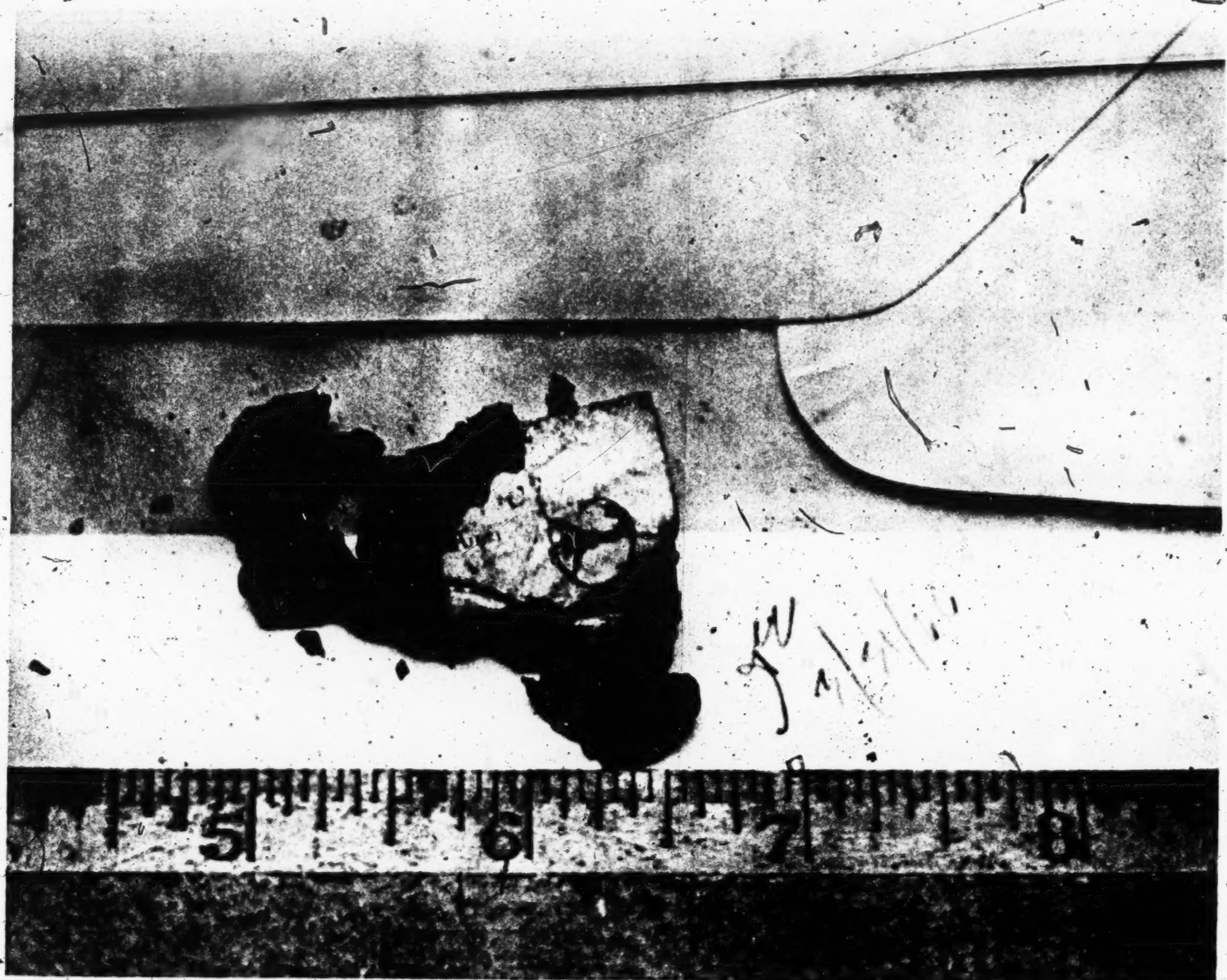
## GOVERNMENT EXHIBIT NO. 1 D





GOVERNMENT EXHIBIT NO. 2A





## GOVERNMENT EXHIBIT NO. 3

1. NAME IN FULL <b>O'BRIEN, David</b>		First Middle <b>Paul</b>		SELECTIVE SERVICE NUMBER <b>19 18 145 949</b>	
2. PLACE OF RESIDENCE <b>34 Norman Drive</b>				3. DATE OF BIRTH <b>Nov. 30, 1945</b>	
City, Town, or Village <b>Frammingham,</b>		County <b>Mass.</b>		4. PLACE OF BIRTH <b>Troy, N.Y.</b>	
5. MAILING ADDRESS (If different than Item 2) <b>335 Troy Garden Apts, Hoosick St</b>				City, State or Country <b>Troy, N.Y.</b>	
City, Town, or Village <b>Troy, N.Y.</b>		State <b>N.Y.</b>		6. DATE OF REGISTRATION <b>12-11-1964</b>	
7. Name and address of person other than a member of your household who will always know your address <b>Mrs. Anna O'Brien (grandmother) 335 Troy Garden Apts, Hoosick St</b>					
8. COLOR EYES <b>Blue</b>		9. COLOR OF HAIR <b>Brn.</b>		10. HEIGHT (APPROX.) <b>6</b> ft. <b>1</b> in.	
11. WEIGHT (APPROX.) <b>185</b>		12. OTHER OBVIOUS PHYSICAL CHARACTERISTICS THAT WILL AID IN IDENTIFICATION: <b>Can. 66.91 Lost Ex-3 scars on right shoulder &amp; wears eye-glasses</b>			
Form Approved Budget Bureau No. 53-R999.7					
SSS Form No. 1-A (Original) (Revised 4-23-61)					
REGISTRATION CARD (over)					



13. OCCUPATION <b>Student</b>	14. NAT. OF BUSINESS, SERVICE RENDERED, OR CIVIL PRODUCT		
15. FIRM OR INDIVIDUAL BY WHOM EMPLOYED <b>Boston Univ.</b>			
16. PLACE OF EMPLOYMENT OR BUSINESS <b>Boston, Mass.</b>			
17. Active duty in the Armed Forces of the United States or a cobelligerent nation since Sept. 16, 1940:			
A. ARMED FORCE OR COUNTRY <b>None</b>	B. SERVICE NO.	C. DATE OF ENTRY	D. DATE OF SEPARATION

18. Present membership in a reserve component of the Armed Forces:

A. ARMED FORCE <b>None</b>	B. SERVICE NO.	C. DATE OF ENTRY	D. GRADE
E. ORGANIZATION			

I affirm that I have verified the foregoing and that they are true:

*David D. B. [Signature]*  
(Signature of registrant)

I certify that the person registered has read or has had read to him his answer; that I have witnessed his signature or mark; and that all of his answers of which I have knowledge are true, except as follows:

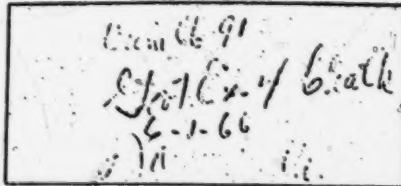
**None**

*[Signature]*  
(Signature of registrar)

Registrar for Local Board ..... 31 ..... **Boston** ..... **Mass.**  
(Number) (City or county) (State)

★ GPO: 1964-723-641

## GOVERNMENT EXHIBIT NO. 4



## (LOCAL BOARD STAMP)

Any person who alters, forges, knowingly destroys, knowingly mutilates or in any manner changes this certificate may be fined not to exceed \$10,000 or imprisoned for not more than five years, or both. The law requires you to have this certificate in your personal possession at all times and to notify your local board in writing within ten days after it occurs, of (1) every change in your address, physical condition and occupational, marital, family, dependency and military status, and (2) any other fact which might change your classification.

Your Selective Service Number, shown on the reverse side, should appear on all communications with your local board. Sign this form immediately upon receipt.

FOR INFORMATION AND ADVICE,  
GO TO ANY LOCAL BOARD.

GPO : - 1966 O - 796 - 910

⑥

SELECTIVE SERVICE SYSTEM  
REGISTRATION CERTIFICATE

SSS Form 2  
(Rev. 9-20-60)

THIS IS TO CERTIFY THAT IN ACCORDANCE WITH THE SELECTIVE SERVICE LAW

(FIRST NAME)		(MIDDLE NAME)		(LAST NAME)	
SELECTIVE SERVICE NO.					
DATE OF BIRTH			PLACE OF BIRTH		
COLOR EYES	COLOR HAIR	HEIGHT	PT.	IN.	WEIGHT

Other obvious physical characteristics:

WAS DULY REGISTERED ON THE \_\_\_\_\_ DAY OF \_\_\_\_\_ 19\_\_\_\_

SIGNATURE OF LOCAL BOARD CLERK



[fol. 65]

## MEMORANDUM

May 25, 1966

SWEENEY, D. J. The defendant is charged in a one count indictment with wilfully burning his Registration Certificate (Selective Service System Form No. 2) in violation of Title 50, App. U. S. C. § 462(b). His counsel has now moved to dismiss the indictment on the ground that it violates various of his constitutional rights.

He argues, first, that because the purpose of the statute, section 462(b), is to abridge and silence the public expression of opposition to government policies, the indictment denies him his rights to freedom of speech and assembly and to the free exercise of political rights as guaranteed by the First, Ninth and Tenth Amendments to the U. S. Constitution. But at this stage of the case, there are no facts to support these allegations. The statute, on its face, does not deprive the defendant of any of these rights and the court is not, in any event, competent to inquire into the motives of Congress in passing this statute, *Sozinsky v. United States*, 300 U.S. 506 (1937).

The defendant next contends that the statute serves no legitimate legislative purpose and, therefore, violates his right to due process under the Fifth Amendment. In *United States v. Miller*, 249 F. Supp. 59 (S.D.N.Y. 1965), Judge Tyler overruled an identical objection and pointed out that, on its face, this statute is an entirely reasonable exercise of the power of Congress to raise armies in the defense of the United States and that, on its face, it does meet the standards of substantive due process. I am not persuaded otherwise by the defendant's argument.

The last argument is that by comparison to other crimes, such as forging a draft card, the indictment subjects the defendant to cruel and unusual punishment. This argument, like the first, is premature. Until a sentence has been imposed, there can be no objection that it violates the Constitution.

The motion to dismiss the indictment is denied.

## JUDGMENT AND COMMITMENT

On this 1st day of July, 1966 came the attorney for the government and the defendant appeared in person and without counsel, the Court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the Court, and the defendant thereupon stated that he waived the right to the assistance of counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of wilfully burning his Registration Certificate (Selective Service System Form No. 2) in violation of Title 50, App., United States Code, Section 462(b), as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative as a youth offender, and that the offense is punishable by imprisonment under applicable provisions of law other than this subsection, and it is further adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for treatment and supervision under the provisions of the Federal Youth Corrections Act. 18 U.S.C. § 5010(b).

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States [fol. 67] Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ GEORGE C. SWEENEY  
*United States District Judge.*

The Court recommends commitment to:

A. True Copy. Certified this 8th day of July, 1966.

/s/ RUSSELL H. PECK  
Clerk

(By) /s/ HOPE K. CONNELL  
Deputy Clerk.

### NOTICE OF APPEAL

Name and address of appellant: David Paul O'Brien,  
Federal Reformatory, Petersburg, Virginia.

Name and address of appellant's attorney: pro se.

Offense: Draft card burning, 50 App. USC, Section  
462 (b).

Concise statement of judgment or order, giving date,  
and any sentence: Committed to the custody of the At-  
torney General July 8, 1966, under the Youth Correction  
Act, 18 USC, Section 5010 (b).

Name of institution where now confined, if not on bail:  
Federal Reformatory, Petersburg, Virginia.

I, the above-named appellant, hereby appeal to the  
United States Court of Appeals for the First Circuit from  
the above-stated judgement.

Dated: July 14, 1966.

/s/ DAVID O'BRIEN  
Appellant.

/s/ DAVID PAUL O'BRIEN

[fol. 69]

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

No. 6813

DAVID PAUL O'BRIEN, DEFENDANT, APPELLANT

UNITED STATES OF AMERICA, APPELLEE

---

Appeal from the United States District Court  
For the District of Massachusetts

---

Before ALDRICH, *Chief Judge*,  
MCENTEE and COFFIN, *Circuit Judges*.

---

Marvin M. Karpatkin, with whom Howard S. Whiteside, Melvin L. Wulf, Henry P. Monaghan and Eleanor Holmes Norton were on brief, for appellant.

John Wall, Assistant U. S. Attorney, with whom Paul F. Markham, United States Attorney, was on brief, for appellee.

---

April 10, 1967

ALDRICH, *Chief Judge*. The defendant was indicted on the charge that he "willfully and knowingly did mutilate, [fol. 70] destroy and change by burning . . . [his] Registration Certificate (Selective Service System Form No.

2); in violation of Title 50, App. United States Code, Section 462(b)." Section 462(b) is composed of six numbered subsections, none of which was identified except as above. The following provisions are more pertinent.

"(3) who forges, alters, *knowingly destroys, knowingly mutilates*,<sup>[1]</sup> or in any manner changes any such certificate . . ."

"(6) who knowingly violates or evades any of the provisions of this title (said sections [451-454, 455-471 of this Appendix]) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer or possession of such certificate."

A regulation required that possession of a certificate be maintained at all times. 32 C.F.R. § 1617.1. The penalty for violation of all sections listed was a fine, not to exceed \$10,000, or imprisonment for not more than five years, or both.

The defendant moved to dismiss the indictment, asserting violation of the First and a number of other amendments. The motion was denied. Thereafter he was tried to a jury. At the trial he conceded that he had burned his certificate, and raised only his constitutional defenses. Upon conviction and sentence<sup>2</sup> he appeals. His position here is that his conduct, publicly done to express his disapproval of the draft and all that it represented, was a lawful exercise of free speech.

[fol. 71] Subsection (b)(3) was originally directed to forgery and fraud. In 1965 some young men of the same mind as the defendant engaged in the same conduct, to wit, the public burning of "draft cards," which he has now imitated.<sup>3</sup> The reaction in Congress was plain. De-

<sup>1</sup> The italics are ours. See *infra*, fn. 4.

<sup>2</sup> Defendant was sentenced under the Youth Correction Act, 18 U.S.C. § 5010(b) (six years):

<sup>3</sup> We are not in a position to say how widespread this behavior became. See Finman & Macaulay, Freedom to Dissent: The Vietnam Protests and the Words of Public Officials, 1966 Wis. L. Rev. 682, 644-53.



spite the fact that subsection (b) (6) already made it an offense to part with possession of a draft card, Congress made it a separate offense if loss of possession was effected in a particular manner. The words "knowingly destroys, knowingly mutilates" were added to subsection (b) (3).<sup>4</sup>

In upholding the validity of this amendment against the same constitutional attack that is presently made, the court in *United States v. Miller*, 2 Cir., 1966, 367 F.2d 72, cert. den. 2/13/67, said, at 77,

"What Congress did in 1965 only strengthened what was already a valid obligation of existing law; i.e., prohibiting destruction of a certificate implements the duty of possessing it at all times."

In support of this assertion the court demonstrated the reasonableness of requiring registrants to be in possession of their cards, and with this demonstration we do not quarrel. *United States v. Kime*, 7 Cir., 1951, 188 F.2d 677, cert. den. 342 U.S. 823. With all respect, however, the existence of prior law requiring registrants to possess their cards at all times does not support the amendment. On the contrary, given that law, we can see [fol. 72] no proper purpose to be served by the additional provision prohibiting destruction or mutilation.<sup>5</sup> The legislative history suggests none,<sup>6</sup> and the Second Circuit suggested none in *Miller*. To repeat our metaphor adopted by the Court in *Jarecki v. G. D. Searle & Co.*, 1961,

<sup>4</sup> P.L. 89-152, 79 Stat. 586, Aug. 30, 1965.

<sup>5</sup> During argument we inquired whether the pecuniary loss to the government by the destruction of a card might be a basis for the amendment. Defendant replied that the point had never been advanced. We find no statute in any other area making such negligible damage a felony. We cannot think that Congress believed the intrinsic value of a draft card to require this protection.

<sup>6</sup> We do not rely in this connection on the fact that the legislative history suggests an improper purpose, see *infra*, but merely note the absence of any proper one. We note, also, that the House Committee on Armed Services conceded that the prior law might "appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals." H.Rep. No. 747, 89th Cong., 1st Sess.

367 U.S. 303, 307, "If there is a big hole in the fence for the big cat, need there be a small hole for the small one?" Cf. *Coakley v. Postmaster of Boston*, 1 Cir., 3/16/67, F.2d

We see no possible interest, or reason, for passing a statute distinguishing between a registrant obligated to carry a card who mails it back to his draft board, *United States v. Kime*, *supra*, and one who puts it in his waste basket. The significant fact in both of these instances is that he is not carrying it. The distinction appears when the destruction itself is an act of some consequence. It requires but little analysis to see that this occurs when, and only when, the destruction is, as in the case at bar, a witnessed event. We would be closing our eyes in the light of the prior law if we did not see on the face of [fol. 73] the amendment that it was precisely directed<sup>7</sup> at public as distinguished from private destruction. In other words, a special offense was committed by persons such as the defendant who made a spectacle of their disobedience.

In singling out persons engaging in protest for special treatment the amendment strikes at the very core of what the First Amendment protects. It has long been beyond doubt that symbolic action may be protected speech.<sup>8</sup> Speech is, of course, subject to necessary regulation in the legitimate interests of the community, *Kovacs v. Cooper*, *infra*, but statutes that go beyond the protection of those interests to suppress expressions of dissent are insupportable. E.g., *Cantwell v. Connecticut*, 1940, 310 U.S. 296, 307-11; *DeJonge v. Oregon*, 1937, 299 U.S. 353; *Terminiello v. Chicago*, 1949, 337 U.S. 1. We so find this one.

<sup>7</sup> While we make no attempt to divine the motive of any particular proponent of the legislation, we regard it as significant that the impact on certain expressions of dissent is no mere random accident, but quite obviously the product of design. Cf. *Grosjean v. American Press Co.*, 1936, 297 U.S. 233; *Gomillion v. Lightfoot*, 1960, 364 U.S. 339.

<sup>8</sup> E.g., *West Virginia Board of Education v. Barnette*, 1943, 319 U.S. 624; *Stromberg v. California*, 1931, 283 U.S. 359.

However, the defendant is not in the clear. In burning his certificate he not only contravened subsection (b) (3), but also subsection (b) (6). He knew this at the time of the burning, for his card summarized both provisions, and he knew it in a larger sense, as is revealed by the memorandum in support of his motion to dismiss, reproduced in his Record Appendix. The memorandum asserted,

"To rely upon individuals having draft cards in their possession as a means of operative [sic] the selective service system would seem to be impractical if not downright dangerous. . . . Whether Defendant O'Brien has his draft card in his possession, whether he burned, mutilated or whatever, will have little or no effect upon the selective service system."

It is apparent that the factual issue of nonpossession has been fully presented and tried and been found against the defendant. F.R.Crim.P. 31(c) provides, "The defendant may be found guilty of an offense necessarily included in the offense charged . . ." See *United States v. Ciongole*, 3 Cir., 1966, 358 F.2d 439. We see no procedural reason why defendant should not stand convicted of this violation of section (b).

Nor do we see any constitutional objection to conviction for nonpossession of a certificate. It is one thing to say that a requirement that has no reasonable basis may impinge upon free speech. Different considerations arise when the statute has a proper purpose and the defendant merely invokes free speech as a reason for breaking it. We would agree, for example, that a provision relating to injury to the Capitol ornaments could not make it a heightened offense if statuary was defaced for the announced purpose of disparaging the individual memorialized. This, essentially, is what subsection (6) has done if its presence has influenced the court in the severity of the sentence, a matter we will come to shortly. However, it could hardly be suggested that free speech permitted defacement of a statue with impunity so long as disparagement was the declared motive. The First Amendment does not give the defendant carte blanche. Cf. *Kovacs v.*

*Cooper*, 1949, 336 U.S. 77; *Giboney v. Empire Storage and Ice Co.*, 1949, 336 U.S. 490.

[fol. 75] This leaves us with one reservation. Very possibly, in imposing sentence, the court took into consideration what the statute, by virtue of the amendment, indicated to be aggravating circumstances. Clearly it was an aggravated offense in the eyes of the proponents of the legislation. See remarks of Representative Rivers, Congressional Record, House, August 10, 1965, at 19135. Doubtless, too, the defendant chose his particular conduct precisely because of its "speaking" aspect. For the court to conclude, as was suggested in the legislative report, H.Rep. No. 747, 89th Cong., 1st Sess. 1-2, that the impact of such conduct would impede the war effort, and measure the sentence by the nature of his communication, would be to punish defendant, pro tanto, for exactly what the First Amendment protects. The only punishable conduct was the intentional failure to carry his card.<sup>9</sup>

While we do not have, and do not purport to exercise, jurisdiction to review a lawful sentence, we do hold that fairness to the defendant requires that he be resentenced upon considerations affirmatively divorced from impermissible factors. *Marano v. United States*, 1 Cir., 3/23/1967, F.2d . . . We remark, further, that any future indictments should be laid under subsection (b) (6) of the statute.

*The judgment of conviction is affirmed and the case is remanded to the District Court to vacate the sentence, and to resentence as it may deem appropriate in the light of this opinion.*

<sup>9</sup> We do not, of course, suggest that if the defendant was urging others to burn their own cards this would have been protected speech. However, we do not understand the government to make this charge.

[fol. 76]

## JUDGMENT

April 10, 1967

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of conviction is affirmed and the case is remanded to the District Court to vacate the sentence, and to resentence as it may deem appropriate in the light of the opinion filed today.

By the Court:

/s/ ROGER A. STINCHFIELD  
Clerk.

Enter:

/s/ ALDRICH, Ch. J.



[fol. 77]

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 6813.

Office-Supreme Court, U.S., Filed, Jun. 8, 1967,  
John F. Davis, Clerk

DAVID PAUL O'BRIEN, DEFENDANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

PETITION FOR REHEARING

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Now comes David Paul O'Brien, defendant, appellant, and respectfully petitions this honorable Court for rehearing, for the following reasons:

On page 5 of its decision, this Court states that defendant stands convicted of non-possession of a draft card, in violation of the regulations promulgated under Title 50, U.S. Code, Section 462. The Court further holds that the crime of non-possession is an includable offense under the charge on which appellant was indicted, which was that he wilfully and knowingly mutilated, destroyed and changed by burning, a draft card. The Court goes on to say that the factual issue of non-possession has been fully presented and tried and found against defendant.

[fol. 78] Defendant, appellant submits:

1. The issue of non-possession was not fully tried and found against him. There was no dispute that he burned a draft card, but there was no evidence that he did not possess a duplicate. It should be pointed out also that de-

defendant had no attorney at his trial; that there was never a suggestion that the issue of non-possession was pertinent; and that the prosecution never offered any evidence of non-possession. The only suggestion of such evidence was a letter dated March 2, 1966, (introduced by defendant) almost a month before the incident for which defendant was indicted occurred, in which he wrote to his draft board that he was returning his draft card to the board. (R. p. 27) However, clearly he still had the card on March 31.

Furthermore, it is possible for a draft card to be mutilated by fire or otherwise, but still not destroyed to the extent where a person can be said no longer to possess it. Presumably, a person, as part of a symbolic protest, could cut the card in half, or in ten parts, or deface it with a political slogan, or burn a hole through the center of it, but he could still possess it. Consequently, the most that can be said is that under some circumstances, total destruction might encompass non-possession. But this can never be assumed as a matter of law, in the absence of proof, and since it involves a criminal conviction, proof beyond a reasonable doubt.

Moreover, there are two Selective Service documents which the regulations require each registrant to possess, the Registration Certificate, S.S. Form No. 2, and the most recently issued Notice of Classification, S.S. Form No. 110. Although the United States District Court for [fol. 79] the Southern District of New York held, in *U. S. v. Miller*, 249 F. Supp. 259 (S.D. N.Y. 1965) that the 1965 amendment encompassed a Notice of Classification as well as a Registration Certificate, this question was never passed on by the Second Circuit, or by any court in this Circuit. Certainly before a defendant can be convicted of a charge not included in his indictment, this issue must be clarified.

In waiving his right to counsel at his trial, defendant could not be held to have foreseen that other charges might be raised for which he might badly need counsel.

"It is as much a violation of due process to send an accused to prison following conviction of a charge on

which he was never tried as it would be to convict him on a charge that was never made."

*Cole v. Arkansas*, 333 U.S. 196; 201

2. Where the charge set forth in the indictment is held unconstitutional, a judgment of conviction is void and a nullity. It cannot therefore be held that any other offense may be included under such a conviction.

*Shafer v. United States*, 179 F.2d 929 (CCA 9) 21 Am. Jur. 2d § 533

This case is strikingly similar to that of *Cole v. Arkansas*, *supra*, in that defendant raised constitutional objections to the charge on which he was indicted, and a higher Court, in order to avoid the dilemma, proceeded to determine defendant to be guilty on another charge on which defendant had not been tried. The United States Supreme Court held that such a procedure denied to defendant in the *Cole* case safeguards guaranteed by due process of law.

[fol. 80] Defendant therefore requests this Court to reconsider, and to reverse the conviction for the reasons herein stated.

In view of the unusual nature of this case involving a holding of un-constitutionality of a statute, it is requested that opportunity for oral argument be granted.

Respectfully submitted,

MARVIN M. KARPATKIN  
660 Madison Avenue  
New York, N. Y. 10021

HOWARD S. WHITESIDE  
60 State Street  
Boston, Mass. 02109

April, 1967.

[fol. 81]

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 6813

DAVID PAUL O'BRIEN, DEFENDANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

Appeal from the United States District Court  
For the District of Massachusetts

---

Before ALDRICH, *Chief Judge*,  
MCENTEE and COFFIN, *Circuit Judges*.

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ON PETITION FOR REHEARING

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*Marvin M. Karpatkin and Howard S. Whiteside* on  
petition for rehearing.

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April 28, 1967

ALDRICH, *Chief Judge*. Defendant's petition for re-hearing makes, essentially, five points.

[fol. 82] 1. If one designated offense is constitutionally protected, there cannot be an included offense. Defendant

cites but one case to support this contention. If it is pertinent at all, it is contrary to his position.

2. The petition at least implies that different consideration should be given to the defendant because he refused counsel in the district court. The court was, properly, most solicitous of the defendant, but it is unheard of that different legal principles became applicable because he chose to represent himself.

3. A distinction should be made between S.S.S. Form 110 (Notice of Classification) and S.S.S. Form 2 (Registration Certificate). Defendant suggests no reason for drawing a distinction, and we can think of none.

4. The "burning" of a card might leave enough card extant so that one still "possessed" the card, and 5. Defendant might have possessed a duplicate card. We might agree with defendant that, for either of these reasons, a burning in some circumstances would not violate the possession requirement. In the present case defendant was convicted under a charge that he did wilfully "mutilate, destroy and change . . ." his card. The conviction was fully supported. The government witnesses described the "charred remains" of the card as a "fragment." Defendant, who was fully advised of his Fifth and Sixth Amendment rights, acknowledged to the witnesses that he had burned "his" card, and permitted the fragment to be photographed. At trial he conceded the photograph's admissibility and "obvious" authenticity. We note, but without approval, defendant's present argument that he would still "possess" a card if it was "cut . . . in ten pieces." The photograph reveals a substantially incomplete card. Manifestly defendant no longer "possessed" that card.

[fol. 83] Nor did defendant's own position permit the suggestion that what was burned was a duplicate of a card still in his possession. Defendant himself introduced and read to the jury his statement to his draft board that he could not "in good conscience carry what is called a draft card." Afterwards the court offered him probation if he would apply for and carry a card but he replied, "I couldn't in good conscience do that," and chose confine-



ment instead. We will not, on such a record, grant rehearing to consider whether defendant was carrying a proper draft card in his possession.

*Petition denied.*

ORDER OF COURT

April 28, 1967

It is ordered that the petition for rehearing filed April 24, 1967, be, and the same hereby is denied.

By the Court:

/s/ ROGER A. STINCHFIELD  
Clerk.

[fol. 84]

SUPREME COURT OF THE UNITED STATES

No. 232, October Term, 1967

UNITED STATES, PETITIONER

v.

DAVID PAUL O'BRIEN

ORDER ALLOWING CERTIORARI—Filed October 9, 1967.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar with No. 233.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

[fol. 85]

SUPREME COURT OF THE UNITED STATES

No. 233, October Term, 1967

DAVID PAUL O'BRIEN, PETITIONER

v.

UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1967.

The petition herein for a writ of certiorari to the United States Court of Appeals for the First Circuit is granted, and the case is placed on the summary calendar with No. 232.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.

JUN 9 1967

JOHN F. BAVIS, CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1966

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**UNITED STATES OF AMERICA, PETITIONER**

**DAVID PAUL O'BRIEN**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT**

---

**THURGOOD MARSHALL,  
Solicitor General,  
Department of Justice,  
Washington, D. C. 20530.**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1966**

---

No.

**UNITED STATES OF AMERICA, PETITIONER**

*v.*

**DAVID PAUL O'BRIEN**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT**

---

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case, entered on April 10, 1967.

**OPINIONS BELOW**

The opinion of the court of appeals (App. A, *infra*, pp. 9-15), and its opinion on rehearing (App. B, *infra*, pp. 17-19), are not yet reported.

## JURISDICTION

The judgment of the court of appeals (App. A, *infra*, p. 16) was entered on April 10, 1967, and a petition for rehearing was denied on April 28, 1967 (App. B, *infra*, pp. 17-19). On May 3, 1967, Mr. Justice Fortas extended the government's time for filing a petition for a writ of certiorari to June 9, 1967. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the 1965 amendment to 50 U.S.C. App. 462(b)(3), making it a crime knowingly to destroy or mutilate a Selective Service certificate, is unconstitutional.

## STATUTE INVOLVED

Section 12(b)(3) of the Universal Military Training and Service Act, 50 U.S.C. App. 462(b)(3), as amended by 79 Stat. 586 (1965), provides:

(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451, 453, 454, 455, 456 and 458-471 of this Appendix), or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or



representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates*, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed \$10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury. [Amendment italicized.]

## STATEMENT

After a jury trial, respondent was convicted in the United States District Court for the District of Massachusetts of knowingly mutilating and destroying his Selective Service Registration Certificate, in violation of Section 12(b)(3) of the Universal Military Training and Service Act, 50 U.S.C. App. 462(b)(3), as amended in 1965 by 79 Stat. 586. On July 1, 1966, he was sentenced under the Federal Youth Corrections Act, 18 U.S.C. 5010(b), to be placed in the custody of the Attorney General for a maximum of six years for supervision and treatment.

The evidence showed that on the morning of March 31, 1966, respondent and three others burned small white cards (assumed to be their draft cards) on the steps of the South Boston Courthouse (R. 8-9, 11-12, 15, 17). A sizable crowd which included several F.B.I. agents witnessed the event. Immediately following the burnings, members of the crowd began attacking respondent and his companions. One F.B.I. agent ushered respondent to safety inside the courthouse. Shortly thereafter, respondent was interviewed by that agent and a second agent. Respondent (who had been advised of his rights) stated that he had burned his Selective Service Registration Certificate because of his beliefs, knowing that he was violating federal law. He showed the agents, and permitted them to photograph, the "charred remains" of the certificate (R. 11-12, 17; see R. 59-60). Respondent, who represented himself at trial, did not contest the facts. Before trial, counsel had filed on

his behalf a motion to dismiss the indictment on the ground that the 1965 amendment to 50 U.S.C. App. 462(b) (3), making it a crime to knowingly mutilate or destroy one's draft card, was unconstitutional. That motion was overruled (R. 65-66).

On appeal, the First Circuit held that the 1965 amendment was unconstitutional. It noted that at the time the law was enacted a regulation of the Selective Service System (32 C.F.R. § 1617.1) required Selective Service registrants to keep their Registration Certificates in their "personal possession at all times" and that wilful violation of the regulation was a crime. 50 U.S.C. App. 462(b) (6). Although conceding that the regulation had a legitimate purpose, the court of appeals reasoned that no valid purpose was served by the 1965 amendment, since conduct punishable under it was also punishable, and to the same degree, under the regulation. The court found that, in light of the prior regulation, the statute must have been "directed at public as distinguished from private destruction" (App. A, *infra*, p. 13), and concluded that, in thus "singling out persons engaging in protest for special treatment" (*ibid.*), the law violated the First Amendment. The court ruled, however, that respondent's conviction should be affirmed under the statutory provision making violation of the regulation a crime. The court deemed such violation a lesser included offense of the offense defined by the 1965 amendment, noting that the proof at trial had clearly established wilful non-possession by respondent of his certificate. Nevertheless, it ordered the case remanded for resentencing in light of its opinion.

Respondent filed a petition for rehearing. The court denied it in an opinion (App. B, *infra*, pp. 17-19) in which it reiterated its view that respondent could properly be convicted of the crime of wilful non-possession of a certificate on the facts of this case, even though there might be instances when the particular mode of mutilation of a certificate would not infringe the requirement of personal possession.

### ARGUMENT

1. The Court of Appeals for the First Circuit held in this case that the Act of Congress making the knowing mutilation or destruction of a Selective Service certificate a crime abridges the First Amendment, and is therefore invalid. The statute has been upheld in two other circuits. *United States v. Miller*, 367 F. 2d 72 (C.A. 2), certiorari denied, 386 U.S. 911; *Smith v. United States*, 368 F. 2d 529 (C.A. 8). This conflict among the circuits as to the validity of a federal criminal statute that is being actively enforced should be promptly resolved. To be sure, the court of appeals, relying on a different statutory provision, affirmed the conviction in this case, but it set aside the sentence on the basis of its constitutional ruling; its judgment is therefore ripe for immediate review.

2. The ruling is a questionable one. If Congress may require a draft registrant to carry his draft card at all times on pain of criminal sanctions—as the court below conceded—it would appear that it may also forbid him to destroy or mutilate his card.



The purposes served by the requirement of possession (e.g., proof that the holder has registered for the draft) can be as thwarted by mutilation or destruction as by mere non-possession.

To be sure, prohibiting mutilation or destruction may inhibit draft-card burning as a symbolic or expressive gesture of protest,<sup>1</sup> but no more so than the admittedly valid prohibition against non-possession. In our view, a statute that serves a legitimate purpose is not invalidated by the fact that it incidentally restricts a mode of dissent or expression that is not speech in any traditional sense. The court of appeals reasoned that the statute had no legitimate purpose because it forbade nothing that was not within the scope of the existing prohibition against wilful non-possession. However, as the court itself recognized in its opinion on rehearing, one can readily posit instances where knowing mutilation of a draft card, although rendering the card useless for the purposes for which it is designed, would not result in loss of possession under the regulation, and hence would be covered only under the 1965 amendment.

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<sup>1</sup> The statute, of course, forbids private or clandestine, as well as public, mutilation or destruction.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

**THURGOOD MARSHALL,**  
*Solicitor General.*

**JUNE 1967.**

## APPENDIX A

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

No. 6813

DAVID PAUL O'BRIEN, DEFENDANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

Appeal from the United States District Court  
For the District of Massachusetts

---

Before ALDRICH, *Chief Judge*,  
MCENTEE and COFFIN, *Circuit Judges*.

---

Marvin M. Karparkin, with whom Howard S. Whiteside, Melvin L. Wulf, Henry P. Monaghan and Eleanor Holmes Norton were on brief, for appellant.

John Wall, Assistant U. S. Attorney, with whom Paul F. Markham, United States Attorney, was on brief, for appellee.

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April 10, 1967ALDRICH, *Chief Judge*. The defendant was indicted on the charge that he "willfully and knowingly did

- mutilate, destroy and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App. United States Code, Section 462(b)." Section 462(b) is composed of six numbered subsections, none of which was identified except as above. The following provisions are here pertinent.

"(3) who forges, alters, *knowingly destroys, knowing mutilates*,<sup>[1]</sup> or in any manner changes any such certificate . . ."

"(6) who knowingly violates or evades any of the provisions of this title (said sections [451-454, 455-471 of this Appendix]) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer or possession of such certificate."

A regulation required that possession of a certificate be maintained at all times. 32 C.F.R. § 1617.1. The penalty for violation of all sections listed was a fine, not to exceed \$10,000, or imprisonment for not more than five years, or both.

The defendant moved to dismiss the indictment, asserting violation of the First and a number of other amendments. The motion was denied. Thereafter he was tried to a jury. At the trial he conceded that he had burned his certificate, and raised only his constitutional defenses. Upon conviction and sentence<sup>2</sup> he appeals. His position here is that his conduct, publicly done to express his disapproval of the draft and all that it represented, was a lawful exercise of free speech.

<sup>1</sup> The italics are ours. See *infra*, fn. 4.

<sup>2</sup> Defendant was sentenced under the Youth Correction Act, 18 U.S.C. § 5010(b) (six years).



Subsection (b) (3) was originally directed to forgery and fraud. In 1965 some young men of the same mind as the defendant engaged in the same conduct, to wit, the public burning of "draft cards," which he has now imitated.<sup>3</sup> The reaction in Congress was plain. Despite the fact that subsection (b) (6) already made it an offense to part with possession of a draft card, Congress made it a separate offense if loss of possession was effected in a particular manner. The words "knowingly destroys, knowingly mutilates" were added to subsection (b) (3).<sup>4</sup>

In upholding the validity of this amendment against the same constitutional attack that is presently made, the court in *United States v. Miller*, 2 Cir., 1966, 367 F.2d 72, *cert. den.* 2/13/67, said, at 77,

"What Congress did in 1965 only strengthened what was already a valid obligation of existing law; i.e., prohibiting destruction of a certificate implements the duty of possessing it at all times."

In support of this assertion the court demonstrated the reasonableness of requiring registrants to be in possession of their cards, and with this demonstration we do not quarrel. *United States v. Kime*, 7 Cir., 1951, 188 F.2d 677, *cert. den.* 342 U.S. 823. With all respect, however, the existence of prior law requiring registrants to possess their cards at all times does not support the amendment. On the contrary, given that law, we can see no proper purpose to be

<sup>3</sup> We are not in a position to say how widespread this behavior became. See Finman & Macaulay, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 Wis. L. Rev. 632, 644-53.

<sup>4</sup> P.L. 89-152, 79 Stat. 586, Aug. 30, 1965.

served by the additional provision prohibiting destruction or mutilation.<sup>5</sup> The legislative history suggests none,<sup>6</sup> and the Second Circuit suggested none in *Miller*. To repeat our metaphor adopted by the Court in *Jarecki v. G. D. Searle & Co.*, 1961, 367 U.S. 303, 307, "If there is a big hole in the fence for the big cat, need there be a small hole for the small one?" Cf. *Coakley v. Postmaster of Boston*, 1 Cir., 3/16/67, F.2d

We see no possible interest, or reason, for passing a statute distinguishing between a registrant obligated to carry a card who mails it back to his draft board, *United States v. Kime*, *supra*, and one who puts it in his wastebasket. The significant fact in both of these instances is that he is not carrying it. The distinction appears when the destruction itself is an act of some consequence. It requires but little analysis to see that this occurs when, and only when, the destruction is, as in the case at bar, a witnessed event. We would be closing our eyes in the light of the prior law if we did not see on the face of the amendment that

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<sup>5</sup> During argument we inquired whether the pecuniary loss to the government by the destruction of a card might be a basis for the amendment. Defendant replied that the point had never been advanced. We find no statute in any other area making such negligible damage a felony. We cannot think that Congress believed the intrinsic value of a draft card to require this protection.

<sup>6</sup> We do not rely in this connection on the fact that the legislative history suggests an improper purpose, see *infra*, but merely note the absence of any proper one. We note, also, that the House Committee on Armed Services conceded that the prior law might "appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals." H.Rep. No. 747, 89th Cong., 1st Sess.

it was precisely directed<sup>7</sup> at public as distinguished from private destruction. In other words, a special offense was committed by persons such as the defendant who made a spectacle of their disobedience.

In singling out persons engaging in protest for special treatment the amendment strikes at the very core of what the First Amendment protects. It has long been beyond doubt that symbolic action may be protected speech.<sup>8</sup> Speech is, of course, subject to necessary regulation in the legitimate interests of the community, *Kovacs v. Cooper*, *infra*, but statutes that go beyond the protection of those interests to suppress expressions of dissent are insupportable. *E.g.*, *Cantwell v. Connecticut*, 1940, 310 U.S. 296, 307-11; *De Jonge v. Oregon*, 1937, 299 U.S. 353; *Terminiello v. Chicago*, 1949, 337 U.S. 1. We so find this one.

However, the defendant is not in the clear. In burning his certificate he not only contravened subsection (b)(3), but also subsection (b)(6). He knew this at the time of the burning, for his card summarized both provisions, and he knew it in a larger sense, as is revealed by the memorandum in support of his motion to dismiss, reproduced in his Record Appendix. The memorandum asserted,

"To rely upon individuals having draft cards in their possession as a means of operative [sic] the selective service system would seem to be imprac-

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<sup>7</sup> While we make no attempt to divine the motive of any particular proponent of the legislation, we regard it as significant that the impact on certain expressions of dissent is no mere random accident, but quite obviously the product of design. *Cf. Grosjean v. American Press Co.*, 1936, 297 U.S. 233; *Gomillion v. Lightfoot*, 1960, 364 U.S. 339.

<sup>8</sup> *E.g.*, *West Virginia Board of Education v. Barnette*, 1943, 319 U.S. 624; *Stromberg v. California*, 1931, 283 U.S. 359.

tical if not downright dangerous. . . . Whether Defendant O'Brien has his draft card in his possession, whether he burned, mutilated or whatever, will have little or no effect upon the selective service system."

It is apparent that the factual issue of nonpossession has been fully presented and tried and been found against the defendant. F.R.Crim.P. 31(c) provides, "The defendant may be found guilty of an offense necessarily included in the offense charged . . ." See *United States v. Ciongole*, 3 Cir., 1966, 358 F.2d 439. We see no procedural reason why defendant should not stand convicted of this violation of section (b).

Nor do we see any constitutional objection to conviction for nonpossession of a certificate. It is one thing to say that a requirement that has no reasonable basis may impinge upon free speech. Different considerations arise when the statute has a proper purpose and the defendant merely invokes free speech as a reason for breaking it. We would agree, for example, that a provision relating to injury to the Capitol ornaments could not make it a heightened offense if statuary was defaced for the announced purpose of disparaging the individual memorialized. This, essentially, is what subsection (6) has done if its presence has influenced the court in the severity of the sentence, a matter we will come to shortly. However, it could hardly be suggested that free speech permitted defacement of a statue with impunity so long as disparagement was the declared motive. The First Amendment does not give the defendant carte blanche. Cf. *Kovacs v. Cooper*, 1949, 336 U.S. 77; *Giboney v. Empire Storage and Ice Co.*, 1949, 336 U.S. 490.



This leaves us with one reservation. Very possibly, in imposing sentence, the court took into consideration what the statute, by virtue of the amendment, indicated to be aggravating circumstances. Clearly it was an aggravated offense in the eyes of the proponents of the legislation. See remarks of Representative Rivers, Congressional Record, House, August 10, 1965, at 19135. Doubtless, too, the defendant chose his particular conduct precisely because of its "speaking" aspect. For the court to conclude, as was suggested in the legislative report, H.Rep. No. 747, 89th Cong., 1st Sess. 1-2, that the impact of such conduct would impede the war effort, and measure the sentence by the nature of his communication, would be to punish defendant, pro tanto, for exactly what the First Amendment protects. The only punishable conduct was the intentional failure to carry his card.<sup>9</sup>

While we do not have, and do not purport to exercise, jurisdiction to review a lawful sentence, we do hold that fairness to the defendant requires that he be resentenced upon considerations affirmatively divorced from impermissible factors. *Marano v. United States*, 1 Cir., 3/23/1967, F.2d . We remark, further, that any future indictments should be laid under subsection (b) (6) of the statute.

*The judgment of conviction is affirmed and the case is remanded to the District Court to vacate the sentence, and to resentence as it may deem appropriate in the light of this opinion.*

---

<sup>9</sup> We do not, of course, suggest that if the defendant was urging others to burn their own cards this would have been protected speech. However, we do not understand the government to make this charge.



## JUDGMENT

April 10, 1967

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of conviction is affirmed and the case is remanded to the District Court to vacate the sentence, and to resentence as it may deem appropriate in the light of the opinion filed today.

By the Court:

/s/ ROGER A. STINCHFIELD  
Clerk.

Enter:

/s/ ALDRICH, Ch. J.

APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

---

No. 6813

DAVID PAUL O'BRIEN, DEFENDANT, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

---

Appeal from the United States District Court  
For the District of Massachusetts

---

Before ALDRICH, *Chief Judge*,  
MCENTEE and COFFIN, *Circuit Judges*.

---

ON PETITION FOR REHEARING

---

*Marvin M. Karpatkin and Howard S. Whiteside on  
petition for rehearing.*

---

April 28, 1967

ALDRICH, *Chief Judge*. Defendant's petition for  
rehearing makes, essentially, five points.

1. If one designated offense is constitutionally protected, there cannot be an included offense. Defendant cites but one case to support this contention. If it is pertinent at all, it is contrary to his position.

2. The petition at least implies that different consideration should be given to the defendant because he refused counsel in the district court. The court was, properly, most solicitous of the defendant, but it is unheard of that different legal principles became applicable because he chose to represent himself.

3. A distinction should be made between S.S.S. Form 110 (Notice of Classification) and S.S.S. Form 2 (Registration Certificate). Defendant suggests no reason for drawing a distinction, and we can think of none.

4. The "burning" of a card might leave enough card extant so that one still "possessed" the card, and 5. Defendant might have possessed a duplicate card. We might agree with defendant that, for either of these reasons, a burning in some circumstances would not violate the possession requirement. In the present case defendant was convicted under a charge that he did wilfully "mutilate, destroy and change . . ." his card. The conviction was fully supported. The government witnesses described the "charred remains" of the card as a "fragment." Defendant, who was fully advised of his Fifth and Sixth Amendment rights, acknowledged to the witnesses that he had burned "his" card, and permitted the fragment to be photographed. At trial he conceded the photograph's admissibility and "obvious" authenticity. We note, but without approval, defendant's present argument that he would still "possess" a card if it was "cut . . . in ten pieces." The photograph reveals a substantially incomplete card. Manifestly defendant no longer "possessed" that card.

Nor did defendant's own position permit the suggestion that what was burned was a duplicate of a card still in his possession. Defendant himself introduced and read to the jury his statement to his draft board that he could not "in good conscience carry what is called a draft card." Afterwards the court offered him probation if he would apply for and carry a card but he replied, "I couldn't in good conscience do that," and chose confinement instead. We will not, on such a record, grant rehearing to consider whether defendant was carrying a proper draft card in his possession.

*Petition denied.*

ORDER OF COURT

April 28, 1967

It is ordered that the petition for rehearing filed April 24, 1967, be, and the same hereby is denied.

By the Court:

/s/ ROGER A. STINCHFIELD  
Clerk.





JUN 9 1967

JOHN F. DAVIS, CLERK

IN THE  
**Supreme Court of the United States**

October Term, 1966

No. **233**

DAVID PAUL O'BRIEN,  
*Cross-Petitioner,*  
*against*

UNITED STATES OF AMERICA,  
*Respondent.*

**CROSS-PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

MARVIN M. KARPATKIN  
660 Madison Avenue  
New York, New York 10021

HOWARD S. WHITESIDE  
60 State Street  
Boston, Massachusetts 02109

MELVIN L. WULF  
c/o American Civil Liberties Union  
156 Fifth Avenue  
New York, New York 10010

*Attorneys for Cross-Petitioner*

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IN THE  
**Supreme Court of the United States**

October Term, 1966

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No. \_\_\_\_\_  
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DAVID PAUL O'BRIEN,

*Cross-Petitioner,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

**CROSS-PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case on April 10, 1967, after which petitioner filed a timely petition for rehearing, which was denied on April 28, 1967. The opinion of the Court of Appeals, and the opinion denying the petition for rehearing, are printed in the appendix hereto, and are not yet reported. The May 25, 1966 memorandum of the District Court denying petitioner's motion to dismiss, is also printed in the appendix hereto and is unreported.



## **Jurisdiction**

The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

## **Questions Presented**

Whether petitioner was denied due process of law under the Fifth Amendment to the United States Constitution when the Court of Appeals reversed his conviction of a violation of 50 U.S.C. App. §462(b)(3), on grounds of the statute's unconstitutionality, and held that he stood convicted of a violation of 50 U.S.C. App. §462(b)(6), an offense of which petitioner had not been charged and on which he was not tried.

## **Statute Involved**

The statutory provision involved is Section 12(b) of the Universal Military Training and Service Act, 50 U. S. C. App., §462 (b) which reads as follows:

“(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title (sections 451-454, 455-471 of this Appendix); or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges,

alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title (said sections), or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title (said sections) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed \$10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury."

### **Statement**

Petitioner was indicted on April 15, 1966 for willfully and knowingly mutilating, destroying and changing by burning his Selective Service Registration Certificate, in violation of 50 U. S. C. App., §462 (b). He pleaded not guilty and was released on bail. A motion to dismiss the indictment was timely filed and orally argued. It was de-

nied on May 25, 1966. The case was tried before a jury in the United States District Court for the District of Massachusetts on June 1, 1966. Petitioner was found guilty and the Court postponed for a month disposition of the case. On July 1, 1966, the District Court ordered petitioner committed to the custody of the Attorney General under the provisions of the Federal Youth Corrections Act, 18 U.S.C., §5010(b). In due course, petitioner's notice of appeal was timely filed and petitioner was later released on bail pending appeal. The Court of Appeals held unconstitutional that portion of 50 U.S.C. App., §462(b)(3) having to do with mutilation and destruction of Selective Service Certificate, of which petitioner had been charged, but held that he stood properly convicted of non-possession of a certificate, an offense under a regulation promulgated under the Act, a violation of which is a crime under 50 U.S.C. App., §462(b)(6). The Court stated that this was an includable offense under the original charge, and that "the factual issue of non-possession" had been fully tried and found against petitioner.

### **Reasons for Granting the Writ**

Certiorari should be granted in response to this cross-petition because the Court of Appeals has decided an important question of constitutional law which should be settled by this Court.

1. The issue of non-possession of a Selective Service certificate was not, contrary to the words of the Court of Appeals "fully presented and tried and been found against the defendant." Op., April 10, p. 5. Petitioner was not

charged with this offense; the prosecution never mentioned it; the jury was not instructed to consider it; and the petitioner had no reason to suppose that he was on trial for it. In these circumstances, due process of law was denied to defendant in convicting him of an offense on which he was not tried and on a charge that was never made. "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). See *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91 (1965); *Ashton v. Kentucky*, 384 U.S. 195 (1966).

The denial of due process is aggravated by the fact that the petitioner was not represented by counsel in the trial court. It is true that he waived his right to counsel for the trial of the charge on which he was indicted. Had he had reason to suppose that other charges were lurking in the background, he might have realized his need for legal assistance. Consequently, petitioner contends that he never intentionally waived his right to counsel on the charge of which he is now held convicted.

2. The Court of Appeals, in its opinion of April 28 denying the petition for rehearing, points out that petitioner admitted that he burned his draft card. Op., p. 2. It is clear, however, that the symbolic burning, and the admission thereof, were acts of principle by petitioner. He admitted the facts and relied on his constitutional arguments. Op., April 10, pp. 2-4. But there is no indication that the same considerations would have motivated petitioner had he been charged with non-possession. His

grievance was with the anti-burning law, now declared unconstitutional and his admissions were limited to his defense of that charge. Perhaps if the government had proceeded against him for non-possession, he would not have felt impelled to raise the constitutional question, and would not have made any admissions. Perhaps the entire defense would have been otherwise, either by petitioner *pro se*, or by counsel whom he might have engaged had he known he stood in jeopardy of a conviction for non-possession under the existing law, as well as a conviction for burning under the new law.

3. Where a charge set forth in the indictment is held unconstitutional, a judgment of a conviction of that charge is void. *Shafer v. United States*, 179 F. 2d 929 (9th Cir. 1950). See also 21 Am. Jur. 2d, Section 533. If the conviction is void, it must follow that a holding that there can be an includable offense thereunder is erroneous.

Furthermore, the Court of Appeals relied on Federal Rule of Criminal Procedure 31 (c) in holding petitioner convicted of an includable offense. This rule applies only to lesser offenses and degrees of offense. *United States v. Martinez-Gonzales*, 89 F. Supp. 62, 65 (S.D. Cal. 1950); *United States v. Gerdell*, 103 F. Supp. 635, 639 (E.D. Mo. 1952). In the statute here involved, there are no degrees of offense, and the maximum punishment for non-possession is the same as that prescribed for the charge on which petitioner was indicted.



### **Conclusion**

**For the foregoing reasons, this cross-petition for a writ of certiorari should be granted.**

**Respectfully submitted,**

**MARVIN M. KARPATKIN  
660 Madison Avenue  
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**HOWARD S. WHITESIDE  
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Boston, Massachusetts 02109**

**MELVIN L. WULF  
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New York, New York 10010**

***Attorneys for Cross-Petitioner***

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6813

DAVID PAUL O'BRIEN,

*Defendant-Appellant,*

*v.*

UNITED STATES OF AMERICA,

*Appellee.*

April 10, 1967

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of conviction is affirmed and the case is remanded to the District Court to vacate the sentence, and to resentence as it may deem appropriate in the light of the opinion filed today.

By the Court:

/s/ ROGER A. STINCHFIELD

*Clerk.*

[cc. Messrs. Karpatkin and Wall.]

**Opinion of the United States Court of Appeals****UNITED STATES COURT OF APPEALS****FOR THE FIRST CIRCUIT**

No. 6813

**DAVID PAUL O'BRIEN,***Defendant-Appellant,**v.***UNITED STATES OF AMERICA,***Appellee.***APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS****Before ALDRICH, Chief Judge,  
McENTEE and COFFIN, Circuit Judges.**

*Marvin M. Karparkin, with whom Howard S. Whiteside, Melvin L. Wulf, Henry P. Monaghan and Eleanor Holmes Norton were on brief, for appellant.*

*John Wall, Assistant U. S. Attorney, with whom Paul F. Markham, United States Attorney, was on brief, for appellee.*

**April 10, 1967.**

**ALDRICH, Chief Judge.** The defendant was indicted on the charge that he "willfully and knowingly did mutilate,

*Appendix*

destroy and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App. United States Code, Section 462(b).” Section 462(b) is composed of six numbered subsections, none of which was identified except as above. The following provisions are here pertinent.

“(3) who forges, alters, *knowingly destroys, knowingly mutilates*,<sup>1</sup> or in any manner changes any such certificate . . .”

“(6) who knowingly violates or evades any of the provisions of this title (said sections [451-454, 455-471 of this Appendix]) or rules and regulations promulgated pursuant thereto relating to the issuance, transfer or possession of such certificate.”

A regulation required that possession of a certificate be maintained at all times. 32 C.F.R. §1617.1. The penalty for violation of all sections listed was a fine, not to exceed \$10,000, or imprisonment for not more than five years, or both.

The defendant moved to dismiss the indictment, asserting violation of the First and a number of other amendments. The motion was denied. Thereafter he was tried to a jury. At the trial he conceded that he had burned his certificate, and raised only his constitutional defenses. Upon conviction and sentence<sup>2</sup> he appeals. His position

1. The italics are ours. See *infra*, fn. 4.

2. Defendant was sentenced under the Youth Correction Act, 18 U.S.C. §5010(b) (six years).

*Appendix*

here is that his conduct, publicly done to express his disapproval of the draft and all that it represented, was a lawful exercise of free speech.

Subsection (b)(3) was originally directed to forgery and fraud. In 1965 some young men of the same mind as the defendant engaged in the same conduct, to wit, the public burning of "draft cards," which he has now imitated.<sup>3</sup> The reaction in Congress was plain. Despite the fact that subsection (b)(6) already made it an offense to part with possession of a draft card, Congress made it a separate offense if loss or possession was effected in a particular manner. The words "knowingly destroys, knowingly mutilates" were added to subsection (b)(3).<sup>4</sup>

In upholding the validity of this amendment against the same constitutional attack that is presently made, the court in *United States v. Miller*, 2 Cir., 1966, 367 F.2d 72, cert. den. 2/13/67, said, at 77,

"What Congress did in 1965 only strengthened what was already a valid obligation of existing law; i.e., prohibiting destruction of a certificate implements the duty of possessing it at all times."

In support of this assertion the court demonstrated the reasonableness of requiring registrants to be in possession of their cards, and with this demonstration we do not

3. We are not in a position to say how widespread this behavior became. See Finman & Macaulay, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 Wis. L. Rev. 632, 644-53.

4. P. L. 89-152, 79 Stat. 586, Aug. 30, 1965.



## Appendix

quarrel. *United States v. Kime*, 7 Cir., 1951, 188 F.2d 677, cert. den. 342 U.S. 823. With all respect, however, the existence of prior law requiring registrants to possess their cards at all times does not support the amendment. On the contrary, given that law, we can see no proper purpose to be served by the additional provision prohibiting destruction or mutilation.<sup>5</sup> The legislative history suggests none,<sup>6</sup> and the Second Circuit suggested none in *Miller*. To repeat our metaphor adopted by the Court in *Jarecki v. G. D. Searle & Co.*, 1961, 367 U.S. 303, 307, "If there is a big hole in the fence for the big cat, need there be a small hole for the small one?" Cf. *Coakley v. Postmaster of Boston*, 1 Cir., 3/16/67, — F.2d —.

We see no possible interest, or reason, for passing a statute distinguishing between a registrant obligated to carry a card who mails it back to his draft board, *United States v. Kime*, *supra*, and one who puts it in his wastebasket. The significant fact in both of these instances is that he is not carrying it. The distinction appears when the destruction itself is an act of some consequence. It

5. During argument we inquired whether the pecuniary loss to the government by the destruction of a card might be a basis for the amendment. Defendant replied that the point had never been advanced. We find no statute in any other area making such negligible damage a felony. We cannot think that Congress believed the intrinsic value of a draft card to require this protection.

6. We do not rely in this connection on the fact that the legislative history suggests an improper purpose, see *infra*, but merely note the absence of any proper one. We note, also, that the House Committee on Armed Services conceded that the prior law might "appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals." H.Rep. No. 747, 89th Cong., 1st Sess.

## Appendix

requires but little analysis to see that this occurs when, and only when, the destruction is, as in the case at bar, a witnessed event. We would be closing our eyes in the light of the prior law if we did not see on the face of the amendment that it was precisely directed<sup>7</sup> at public as distinguished from private destruction. In other words, a special offense was committed<sup>8</sup> by persons such as the defendant who made a spectacle of their disobedience.

In singling out persons engaging in protest for special treatment the amendment strikes at the very core of what the First Amendment protects. It has long been beyond doubt that symbolic action may be protected speech.<sup>9</sup> Speech is, of course, subject to necessary regulation in the legitimate interests of the community, *Kovacs v. Cooper*, *infra*, but statutes that go beyond the protection of those interests to suppress expressions of dissent are insupportable. *E.g.*, *Cantwell v. Connecticut*, 1940, 310 U.S. 296, 307-11; *DeJonge v. Oregon*, 1937, 299 U.S. 353; *Terminiello v. Chicago*, 1949, 337 U.S. 1. We so find this one.

However, the defendant is not in the clear. In burning his certificate he not only contravened subsection (b)(3), but also subsection (b)(6). He knew this at the time of the

7. While we make no attempt to divine the motive of any particular proponent of the legislation, we regard it as significant that the impact on certain expressions of dissent is no mere random accident, but quite obviously the product of design. *Cf. Grosjean v. American Press Co.*, 1936, 297 U.S. 233; *Gomillion v. Lightfoot*, 1960, 364 U.S. 339.

8. *E.g.*, *West Virginia Board of Education v. Barnette*, 1943, 319 U.S. 624; *Stromberg v. California*, 1931, 283 U.S. 359.

*Appendix*

burning, for his card summarized both provisions, and he knew it in a larger sense, as is revealed by the memorandum in support of his motion to dismiss, reproduced in his Record Appendix. The memorandum asserted,

"To rely upon individuals having draft cards in their possession as a means of operative [sic] the selective service system would seem to be impractical if not downright dangerous. . . . Whether Defendant O'Brien has his draft card in his possession, whether he burned, mutilated or whatever, will have little or no effect upon the selective service system."

It is apparent that the factual issue of nonpossession has been fully presented and tried and been found against the defendant. F.R.Crim.P. 31(c) provides, "The defendant may be found guilty of an offense necessarily included in the offense charged . . . ." See *United States v. Ciongole*, 3 Cir., 1966, 358 F.2d 439. We see no procedural reason why defendant should not stand convicted of this violation of section (b).

Nor do we see any constitutional objection to conviction for nonpossession of a certificate. It is one thing to say that a requirement that has no reasonable basis may impinge upon free speech. Different considerations arise when the statute has a proper purpose and the defendant merely invokes free speech as a reason for breaking it. We would agree, for example, that a provision relating to injury to the Capitol ornaments could not make it a heightened offense if statuary was defaced for the announced purpose of disparaging the individual memorial-

### Appendix

ized. This, essentially, is what subsection (6) has done if its presence has influenced the court in the severity of the sentence, a matter we will come to shortly. However, it could hardly be suggested that free speech permitted defacement of a statue with impunity so long as disparagement was the declared motive. The First Amendment does not give the defendant carte blanche. Cf. *Kovacs v. Cooper*, 1949, 336 U.S. 77; *Giboney v. Empire Storage and Ice Co.*, 1949, 336 U.S. 490.

This leaves us with one reservation. Very possibly, in imposing sentence, the court took into consideration what the statute, by virtue of the amendment, indicated to be aggravating circumstances. Clearly it was an aggravated offense in the eyes of the proponents of the legislation. See remarks of Representative Rivers, Congressional Record, House, August 10, 1965, at 19135. Doubtless, too, the defendant chose his particular conduct precisely because of its "speaking" aspect. For the court to conclude, as was suggested in the legislative report, H.Rep. No. 747, 89th Cong., 1st Sess. 1-2, that the impact of such conduct would impede the war effort, and measure the sentence by the nature of his communication, would be to punish defendant, pro tanto, for exactly what the First Amendment protects. The only punishable conduct was the intentional failure to carry his card.<sup>9</sup>

---

9. We do not, of course, suggest that if the defendant was urging others to burn their own cards this would have been protected speech. However, we do not understand the government to make this charge.

*Appendix*

While we do not have, and do not purport to exercise, jurisdiction to review a lawful sentence, we do hold that fairness to the defendant requires that he be resentenced upon considerations affirmatively divorced from impermissible factors. *Marano v. United States*, 1 Cir., 3/23/1967, — F.2d —. We remark, further, that any future indictments should be laid under subsection (b)(6) of the statute.

*The judgment of conviction is affirmed and the case is remanded to the District Court to vacate the sentence, and to resentence as it may deem appropriate in the light of this opinion.*



**Opinion of the United States Court of Appeals  
Denying Petition for Rehearing**

**UNITED STATES COURT OF APPEALS**

**FOR THE FIRST CIRCUIT**

No. 6813

---

DAVID PAUL O'BRIEN,

*Defendant-Appellant,*

*v.*

UNITED STATES OF AMERICA,

*Appellee.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

---

Before ALDRICH, *Chief Judge*,  
McENTEE and COFFIN, *Circuit Judges*.

---

ON PETITION FOR REHEARING

---

*Marvin M. Karpatkin and Howard S. Whiteside* on petition for rehearing.

---

April 28, 1967.

ALDRICH, *Chief Judge*. Defendant's petition for rehearing makes, essentially, five points.

*Appendix*

1. If one designated offense is constitutionally protected, there cannot be an included offense. Defendant cites but one case to support this contention. If it is pertinent at all, it is contrary to his position.

2. The petition at least implies that different consideration should be given to the defendant because he refused counsel in the district court. The court was, properly, most solicitous of the defendant, but it is unheard of that different legal principles became applicable because he chose to represent himself.

3. A distinction should be made between S.S.S. Form 110 (Notice of Classification) and S.S.S. Form 2 (Registration Certificate). Defendant suggests no reason for drawing a distinction, and we can think of none.

4. The "burning" of a card might leave enough card extant so that one still "possessed" the card, and 5. Defendant might have possessed a duplicate card. We might agree with defendant that, for either of these reasons, a burning in some circumstances would not violate the possession requirement. In the present case defendant was convicted under a charge that he did wilfully "mutilate, destroy and change . . ." his card. The conviction was fully supported. The government witnesses described the "charred remains" of the card as a "fragment." Defendant, who was fully advised of his Fifth and Sixth Amendment rights, acknowledged to the witnesses that he had burned "his" card, and permitted the fragment to be pho-

*Appendix*

tographed. At trial he conceded the photograph's admissibility and "obvious" authenticity. We note, but without approval, defendant's present argument that he would still "possess" a card if it was "cut . . . in ten pieces." The photograph reveals a substantially incomplete card. Manifestly defendant no longer "possessed" that card.

Nor did defendant's own position permit the suggestion that what was burned was a duplicate of a card still in his possession. Defendant himself introduced and read to the jury his statement to his draft board that he could not "in good conscience carry what is called a draft card." Afterwards the court offered him probation if he would apply for and carry a card but he replied, "I couldn't in good conscience do that," and chose confinement instead. We will not, on such a record, grant rehearing to consider whether defendant was carrying a proper draft card in his possession.

*Petition denied.*

**Opinion of the District Court Denying  
Motion to Dismiss**

**MEMORANDUM**

**May 25, 1966**

SWEENEY, D. J. The defendant is charged in a one count indictment with wilfully burning his Registration Certificate (Selective Service System Form No. 2) in violation of Title 50, App. U. S. C. §462(b). His counsel has now moved to dismiss the indictment on the ground that it violates various of his constitutional rights.

He argues, first, that because the purpose of the statute, section 462(b), is to abridge and silence the public expression of opposition to government policies, the indictment denies him his rights to freedom of speech and assembly and to the free exercise of political rights as guaranteed by the First, Ninth and Tenth Amendments to the U. S. Constitution. But at this stage of the case, there are no facts to support these allegations. The statute, on its face, does not deprive the defendant of any of these rights and the court is not, in any event, competent to inquire into the motives of Congress in passing this statute, *Sozinsky v. United States*, 300 U. S. 506 (1937).

The defendant next contends that the statute serves no legitimate legislative purpose and, therefore, violates his right to due process under the Fifth Amendment. In *United States v. Miller*, 249 F. Supp. 59 (S.D.N.Y. 1965), Judge Tyler overruled an identical objection and pointed

*Appendix*

out that, on its face, this statute is an entirely reasonable exercise of the power of Congress to raise armies in the defense of the United States and that, on its face, it does meet the standards of substantive due process. I am not persuaded otherwise by the defendant's argument.

The last argument is that by comparison to other crimes, such as forging a draft card, the indictment subjects the defendant to cruel and unusual punishment. This argument, like the first, is premature. Until a sentence has been imposed, there can be no objection that it violates the Constitution.

3 The motion to dismiss the indictment is denied.





JUL 19 1967

JOHN F. DAVIS, CLERK

**In the Supreme Court of the United States**  
**OCTOBER TERM, 1967**

**DAVID PAUL O'BRIEN, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

**ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1967**

---

**No. 233**

**DAVID PAUL O'BRIEN, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

---

**ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE FIRST CIRCUIT**

---

**MEMORANDUM FOR THE UNITED STATES**

---

Petitioner was convicted of violating the 1965 amendment to 50 U.S.C. App. 462(b) (3) making it a crime to knowingly mutilate or destroy a selective service certificate. On appeal, the Court of Appeals for the First Circuit held that the amendment was unconstitutional. The government has filed a petition to review that ruling (No. 232, this Term) on the ground that it is in conflict with the decision of two other circuits on the same question.

Despite its ruling on the unconstitutionality of the statute, the First Circuit affirmed petitioner's conviction (although vacating the sentence and remanding for resentencing), finding that the evidence clearly established that petitioner had wilfully violated a Selective Service regulation (32 C.F.R. 1617.1) which requires Selective Service registrants to keep their Registration Certificates in their "personal possession at all times". Wilful violation of the regulation is punishable to the same extent as a violation of Section 462(b)(3). See 50 U.S.C. App. 462(b)(6).

The cross-petition challenges the court of appeals' action in affirming the conviction. If this Court agrees with the government that the 1965 amendment under which petitioner was indicted is a valid exercise of congressional power, there will be no occasion to consider the soundness of the court of appeals' affirmance of the conviction on another ground. Should this Court disagree with us on the constitutional question, however, a substantial question would be presented as to whether the conviction may be affirmed. We therefore do not oppose the granting of the cross-petition together with the petition, and the consolidation of the cases for briefing and argument.

In affirming petitioner's conviction, the court of appeals relied on the doctrine of lesser included offenses. However, under this Court's rulings, a "defendant may be found guilty of an offense necessarily included in the offense charged" (F.R. Crim. P. 31(c)) only if the charged offense is a greater crime and the conduct which establishes the included offense is an element of the charged offense. *E.g., Sansone v. United*



*States*, 380 U.S. 343; *Berra v. United States*, 351 U.S. 131. It is doubtful that either condition is satisfied here, since wilful nonpossession of a draft card carries the identical punishment as wilful destruction or mutilation, and since nonpossession—as we have argued in our petition in No. 232—is not a necessary element of the crime of destruction or mutilation.

Perhaps, the result reached below may be sustained on the theory that an indictment is deemed to charge all the crimes that its factual allegations fairly comprehend. "In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute. See *Williams v. United States*, 168 U.S. 382." *United States v. Hutcheson*, 312 U.S. 219, 229. Since the indictment charged a destruction of petitioner's draft card by burning, it comprehended nonpossession as well, since nonpossession would be a necessary consequence of destruction. On the other hand, it is arguable that the principle of *Williams* and *Hutcheson* should be limited to cases involving a challenge to the indictment as failing to charge any offense, in light of the Court's later decision in *Cole v. Arkansas*, 333 U.S. 196. There, it was held a violation of due process to convict on a charge not specified in the indictment, albeit guilt of that charge was necessarily



established by the jury's verdict finding the defendants guilty of the charge in the indictment.

We do not suggest at this juncture a definitive resolution to this difficult question. Since it cannot be deemed insubstantial and since it will be inescapably presented if this Court should reject the government's position in No. 233, we believe that it would be appropriate for the Court to grant the cross-petition and consolidate the cases for briefing and argument.

Respectfully submitted.

THURGOOD MARSHALL,  
*Solicitor General.*

JULY 1967.

**In the Supreme Court of the United States**  
**OCTOBER TERM, 1967**

**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**DAVID PAUL O'BRIEN**

**DAVID PAUL O'BRIEN, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

**ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT**

**BRIEF FOR THE UNITED STATES**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1967**

---

**No. 232**

**UNITED STATES OF AMERICA, PETITIONER**

**v.**

**DAVID PAUL O'BRIEN**

---

**No. 233**

**DAVID PAUL O'BRIEN, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

---

**ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT**

---

**BRIEF FOR THE UNITED STATES**

---

**OPINIONS BELOW**

The opinions of the court of appeals (R. 60-65, 67-69) are reported at 376 F. 2d 538. The memorandum opinion of the district court (R. 57) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on April 16, 1967 (R. 66). A petition for rehearing in No. 233 was denied on April 28, 1967 (R. 72). On May 3 and 15, 1967, respectively, Mr. Justice Fortas extended the time for filing both petitions for writs of certiorari to and including June 9, 1967. The petition in No. 232 was filed on June 8, 1967 and the petition in No. 233 on June 9, 1967. Both petitions were granted on October 9, 1967 (R. 72-73; 389 U.S. 814). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. In No. 232, whether the 1965 amendment to the Universal Military Training and Service Act (50 U.S.C. App. 462(b)(3)), making it a crime knowingly to destroy or mutilate a Selective Service certificate, is a constitutional exercise of congressional power.

2. If the Court were to decide that the amendment is unconstitutional, it would then reach the question raised in No. 233; *i.e.*, whether, despite the invalidity of the statute, the court of appeals properly affirmed respondent's conviction on the ground that the draft-card burning in this case also violated an administrative regulation requiring that a registrant retain his registration certificate in his "personal possession at all times."

## STATUTE AND REGULATIONS INVOLVED

Section 12(b) of the Universal Military Training and Service Act, 50 U.S.C. App. 462(b), as amended, 79 Stat. 586, provides:

(b) Any person (1) who knowingly transfers or delivers to another; for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates*, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title [said sections], or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title [said sections] or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or posses-

sion of such certificate, shall, upon conviction, be fined not to exceed \$10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury. [1965 amendment italicized.]

32 C.F.R. 1617.1 provides in pertinent part:

Every person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2) prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. \* \* \*

32 C.F.R. 1623.5 provides in pertinent part:

Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate \* \* \* a valid Notice of Classification (SSS Form No. 110) issued to him showing his current classification. \* \* \*

#### STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, respondent <sup>1</sup>

<sup>1</sup> Petitioner in No. 233 is herein referred to as respondent.



was convicted of knowingly destroying and mutilating his Selective Service Registration Certificate, in violation of Section 12(b)(3) of the Universal Military Training and Service Act, 50 U.S.C. App. 462(b)(3), as amended in August 1965 by 79 Stat. 586 (R. 3, 35). On July 1, 1966, he was sentenced under the Federal Youth Corrections Act, 18 U.S.C. 5010(b), to the custody of the Attorney General for a maximum period of six years for supervision and treatment (R. 58).

The evidence—which is not in dispute—reveals, in brief, that on the morning of March 31, 1966, respondent and three others burned small white cards (apparently their Selective Service Registration Certificates) on the steps of the South Boston Courthouse (R. 3, 8-10, 11-12, 14-16, 29-30; Gov't Exhs. 2-A, 2-B, see R. 52-53). A sizable crowd, which included several F.B.I. agents and representatives of the news media, witnessed the event. Immediately thereafter members of the crowd began attacking respondent and his companions. One F.B.I. agent ushered respondent to safety inside the courthouse. Respondent was thereupon interviewed by that agent and a second agent. After having been advised of his right of silence and right to counsel, he stated that he had burned his draft card because of his beliefs, knowing that he was violating federal law. He showed the agents, and permitted them to photograph, the "charred remains" of the certificate (R. 11-12, 15-16; see R. 52-53). Respondent, who represented himself at trial, did not contest the fact that he had burned his draft card (R. 29). He stated in argument to the

jury (he did not testify as a witness) that he burned his card publicly in order to influence others to adopt his anti-war beliefs (R. 29).

Before trial, counsel representing respondent had filed a motion to dismiss the indictment on the ground that the 1965 amendment to 50 U.S.C. App. 462(b) (3) was unconstitutional (R. 3-6). That motion was denied by the trial court (R. 57),<sup>2</sup> but the contention was sustained on appeal. The court of appeals noted that, when the 1965 amendment was adopted, a regulation of the Selective Service System (32 C.F.R. 1617.1; see also 32 C.F.R. 1623.5) required Selective Service registrants to keep their registration certificates in their "personal possession at all times," and that therefore the knowing violation of the regulation was a crime under 50 U.S.C. App. 462(b) (6) (R. 61). Acknowledging that the regulation had a legitimate purpose, the court of appeals reasoned that no separate or valid function could be served by the 1965 statutory amendment, since conduct punishable under it was also punishable, and to the same degree, under the "possession" regulation. The court found that, in light of the existence of that regulation, the statute must have been "directed at public as distinguished from private destruction"

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<sup>2</sup> In a memorandum opinion, the trial court stated that the statute does not, on its face, deprive persons of any constitutional rights, that the court was not "competent to inquire into the motives of Congress in passing this statute \* \* \*" and "that, on its face, this statute is an entirely reasonable exercise of the power of Congress to raise armies in the defense of the United States \* \* \*" and thus "meet[s] the standards of substantive due process" (R. 57).

(R. 62-63), and it concluded that, in thus "singling out persons engaging in protest for special treatment," the law violated the First Amendment (*ibid.*). The court ruled, however, that respondent's conviction should be affirmed under the statutory provision making violation of the "possession" regulation a crime. It regarded that violation as included within the offense charged, noting that the proof at trial had clearly established knowing non-possession by respondent of his registration certificate. Because of the possibility that, "in imposing sentence, the [district] court took into consideration what the statute, by virtue of the amendment, indicated to be aggravating circumstances \* \* \*," the court of appeals ordered the case remanded for resentencing in light of its opinion (R. 64-65).

In denying a petition for rehearing (R. 67-69), the court below reiterated its view that respondent could properly be convicted of wilful non-possession of a certificate on the facts of this case, even though there might be occasions when the particular mode of mutilation of a certificate would not violate the requirement of personal possession (R. 70-72).

## SUMMARY OF ARGUMENT

### I

The 1965 amendment to the Universal Military Training and Service Act proscribes the *act* of draft-card destruction, and is in no direct way aimed at restricting speech. Since the statute does not inhibit any mode of expression traditionally afforded protec-

tion under the First Amendment, its constitutional validity turns on whether the legitimate purpose served by the legislation—i.e., to facilitate the effective operation of the Selective Service System—outweighs whatever incidental effect the statute might have in limiting the expression of dissent. Since any intrusion on First Amendment rights which results from the 1965 amendment's enforcement is minimal, the statute should be upheld as a proper exercise of congressional power.

A. Draft-card destruction by burning, however labeled, is *conduct*, not speech. Terming that conduct "symbolic speech" does not transform it into an activity entitled to the same kind of constitutional protection given to words and to other modes of expression closely related to speech. Rather, the decisive consideration is whether the activity fits within this Court's decisions which have treated certain types of conduct as though they were in fact speech. Those decisions show that a limited class of activities will be treated as speech where the acts are inextricably tied to oral expression or where no reasonably effective alternative means of communication is available.

The burning of a document which has a valid place in the operation of the Selective Service process hardly qualifies under these decisions for protection as "symbolic speech". Such conduct has no time-honored, ritualistic connotations. Nor is it an essential means for the wide dissemination of a dissenting point of view, since an array of effective, alternative modes of expression exist. Draft-card burning undeniably adds

a histrionic element to protest activity. But the First Amendment does not protect acts otherwise reasonably within the power of Congress to proscribe simply because they are theatrical or dramatic in character.

The 1965 amendment is narrowly drawn, with precision and clarity, to proscribe a specific type of conduct. A variety of statutes use similar language to prohibit the destruction of public property. The statutory words convey a definite warning as to the activity prohibited, and in no sense suffer from overbreadth or vagueness. None of the decisions which have struck down statutes on such grounds thus have relevance here.

B. The 1965 amendment serves a reasonable and justifiable purpose. The statutory prohibition of draft-card destruction is in aid of the administrative task of procuring and classifying manpower for military service. It thus provides a speedy method of identifying the Selective Service registrant, serves as a record of registration and classification, and reminds the registrant of various obligations. Since the draft card is a useful tool in the administrative process, Congress could properly decide to prohibit its destruction or mutilation.

Although the court of appeals recognized the administrative significance of requiring a registrant to retain and carry his draft card, it reasoned that, since existing regulations require possession of the card at all times, the only purpose of the prohibition on destruction was to inhibit dissent rather than ban conduct. In this respect, the court overlooked the



fact that Congress need not rely upon administrative regulations to prohibit conduct which it seeks to prevent. As the legislative history of the 1965 amendment shows, Congress determined that an express statutory bar, in contrast a regulation requiring possession, would be likely to have a greater deterrent impact with respect to acts considered disruptive of the orderly operation of the Selective Service System. Congress is not restricted from exercising its legislative authority in a particular way simply because its enactment overlaps an existing administrative sanction. Nor are destruction or mutilation and non-possession of a draft card necessarily coextensive in all situations.

The legislative history of the 1965 amendment reveals no underlying congressional motive to stifle dissent. It shows only that, during the limited consideration of the legislation, three members of Congress indicated that the proposed amendment would serve not only a Selective Service purpose but would also put Congress on record to the effect that draft-card burning was unpatriotic. This is an appropriate occasion, particularly in light of the near-unanimous passage of the amendment, for application of the familiar principle of non-inquiry into the complex of motives which might have led to the exercise of congressional power.

## II

While it found the statutory bar unconstitutional, the court of appeals nonetheless sustained petitioner's conviction on the ground that by burning his draft

card he also violated the regulation requiring that a registrant have his draft card "in his personal possession at all times." If the Court reaches the question as to the validity of this holding—which it need do only if it finds the statute unconstitutional—it should uphold the result reached by the court below.

Neither the indictment, the government's evidence nor the trial court's instructions raised any question that by convicting the petitioner of draft-card destruction, the jury would not also be convicting him of failure to possess his card. Thus, in following the trial court's instructions—that in order to convict petitioner it had to find that he burned his draft card knowing that it was a wrongful act—the jury also must have found that petitioner did not possess his card.

*Cole v. Arkansas*, 333 U.S. 196, is inapposite. That case held only that a conviction could not be sustained on appeal under a statutory provision which, in light of the trial court's instructions, the jury could not have relied upon in convicting the defendants. Here, on the other hand, petitioner burned his draft card until it was only "charred) remains". Without regard, then, to whether non-possession is technically speaking a lesser included offense of destruction or mutilation, a conviction for knowing destruction necessarily encompassed a finding of non-possession.

## ARGUMENT

### I. There Is No Constitutional Bar to an Act of Congress Which Prohibits the Knowing Destruction or Mutilation of a Selective Service Certificate

The central issue in this case is the validity under the First Amendment to the United States Constitution of the 1965 amendment to the Universal Military Training and Service Act of 1948.<sup>3</sup> We stress at the outset that the statutory provision is neither directed at speech in its "most pristine and classic form" (*Edwards v. South Carolina*, 372 U.S. 229, 235), nor at any other recognized mode of expression traditionally afforded protection under the First Amendment. Rather, the legislative command brings within its proscription only discrete and specific conduct—conduct which Congress, in the exercise of its legislative judgment, could reasonably conclude would impair the effective operation of the Selective Service System if allowed to go unrestrained. The existence of this legitimate congressional purpose, we submit, should be held conclusive on the question of constitutionality. Since the statute has at most an ancillary and minimal impact on the expression of dissent, its function of facilitating the operation of the Selective Service system justifies the enactment as a proper exercise of congressional power.

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<sup>3</sup> This is the issue posed in No. 232. The issue raised in the cross-petition (No. 233), upon which certiorari was also granted, concerns the propriety of the court of appeals' upholding of respondent's conviction, assuming the unconstitutionality of the statute. This issue need be reached only if the Court were to decide that the statute is unconstitutional. We discuss that question *infra*, pp. 31-36.

**A. The 1965 amendment to the Universal Military Service and Training Act has at most an incidental and remote impact on First Amendment guarantees.**

As with other provisions of the statute to which it was added (see *supra*, pp. 3-4), the 1965 amendment to the Universal Military Training and Service Act is directed only at specific conduct—i.e., the knowing destruction and mutilation of Selective Service Registration Certificates.<sup>4</sup> Accordingly, its validity under the First Amendment must be judged in light of the familiar distinction between legislation directed at speech *per se* and legislation which seeks, as here, to prohibit the performance of particular acts. However labeled, “draft-card” destruction by burning is *conduct*. As such, it is not entitled to the same kind of protection—if entitled to any protection at all—that has traditionally been accorded to speech and other closely allied modes of expression. See, e.g., *Schneider v. State*, 308 U.S. 147, 160-161; *Martin v. Struthers*, 319 U.S. 141, 143; *Giboney v. Empire*

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<sup>4</sup> Throughout this brief we use the term “registration certificate” and “draft card” interchangeably to designate both the “Registration Certificate” given to the registrant at the time he first registers for the draft and the “Notice of Classification” which is sent to him any time there has been a change in his classification. While 50 U.S.C. App. 462(b) does not specifically refer to the “Notice of Classification”, it does explicitly bring within its terms any certificate “issued pursuant to \* \* \* rules or regulations promulgated hereunder.” The Selective Service Regulations (which are such “rules”) provide for the issuance of the “Notice of Classification” as well as the “Registration Certificate” and require the registrant to have both documents “in his personal possession at all times” (32 C.F.R. 1617.1, 1623.5). See *United States v. Turner*, 246 F. 2d 228, 230 (C.A. 2).



conveyed to a wide audience. Indeed, the daily headlines show that there are all sorts of legitimate ways of vigorously expressing dissent—whether through the use of mass communication media, the public meeting hall, the peaceable demonstration or the distribution of literature. Burning draft cards may add a theatrical aura to a protest.<sup>8</sup> But one does not have a constitutional right to perform acts otherwise subject to restraint simply because they are dramatic.<sup>9</sup>

In sum, the fact that draft-card burning is a way to dramatize opposition to governmental policies—or to government in general—is hardly conclusive of the constitutional question here involved.<sup>10</sup> The vital con-

<sup>8</sup> Paraders may not demonstrate in contravention of an injunction which they never sought to vacate, even though having marched in violation of the judicial order obviously heightened the drama of their protest. *Walker v. City of Birmingham*, 388 U.S. 307, 315. And the use of sound trucks is not constitutionally protected from reasonable regulation, since other "easy means of publicity are open," even though such devices are more akin to pure speech than to communicative conduct. *Kovacs v. Cooper*, 336 U.S. 77, 89 (opinion of Mr. Justice Reed, announcing the judgment of the Court). Nor can the act of draft-card burning be regarded as constituting a petition for redress of grievances (compare *Edwards v. South Carolina*, 372 U.S. 229, 235), and entitled as such to protection under the First Amendment.

<sup>9</sup> Likewise dramatic in effect was the bizarre display of offensive objects on a clothesline in protest against what were thought to be high property taxes; yet an ordinance prohibiting such clotheslines in front and side yards abutting streets was upheld against First Amendment attack in *People v. Stover*, 12 N.Y.2d 462, appeal dismissed, 375 U.S. 42.

<sup>10</sup> In a related context, in *Zemel v. Rusk*, this Court recently stated 381 U.S. 1, 17:

\* \* \* [T]he prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to



sideration is that other effective means for expressing such ideas plainly exist—means which do not interfere in any significant way with the orderly functioning of government.<sup>11</sup> Protection of “symbolic speech”, as distinguished from words alone, is admittedly attenuated, and is afforded by the Constitution where shown to be necessary to ensure effective communication of the ideas sought to be expressed. Such a situation, we submit, is not presented here.

2. The 1965 amendment to Section 462(b) is clearly drawn to punish specific conduct. The crucial statutory words—“destroys” or “mutilates”—have regularly been used in an array of criminal statutes.<sup>12</sup>

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gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. \* \* \*

<sup>11</sup> A classic statement of this fundamental proposition is contained in *Schneider v. State*, 308 U.S. 147, 160-161: “\* \* \* [A] person could not exercise this liberty [of free speech] by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantees of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets. Prohibition of such conduct would not abridge the constitutional liberty since such activity bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.”

<sup>12</sup> See e.g., 18 U.S.C. 2071 (“[w]hoever, willfully and unlawfully \* \* \* mutilates, obliterates, or destroys” documents); 18 U.S.C. 506 (“[w]hoever falsely \* \* \* mutilates, or alters” the

Laws and ordinances which prohibit the defacement of public buildings, the desecration of public parks, and the destruction of public property of other description are a commonplace throughout the Nation. Their validity is unquestioned. And they do not become unenforceable when the charge of violation is met by the defense that the offender was seeking to express dissent or to indicate his distaste for the city fathers.

Nor is there any problem of overbreadth. The language here is sufficiently precise and definite to pinpoint the exact type of conduct Congress intended to ban. It is obviously not comparable to that of those open-ended local "breach of peace" statutes which this Court has found to be unconstitutional. See, e.g., *Ashton v. Kentucky*, 384 U.S. 195, 200; *Edwards v. South Carolina*, 372 U.S. 229, 237-238; *Cox v. Louisiana*, 379 U.S. 536, 551-552; see also *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-438, and cases there cited.<sup>13</sup> Nor does Section 462(b) (3) contain statutory words which are indefinite or vague in Fifth Amendment terms. It "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." *United States v. Petrillo*, 332 U.S. 1, 8;

seals of any department or agency of the United States); 18 U.S.C. 443 ("[w]hoever willfully \* \* \* mutilates \* \* \* destroys" contracts relating to the war effort). [or]

<sup>13</sup> To the contrary, here we have a criminal conviction "resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed." *Edwards v. South Carolina*, *supra*, 372 U.S. at 236.

*Roth v. United States*, 354 U.S. 476, 491-492;  
*N.A.A.C.P. v. Button*, *supra*.

**B. The 1965 amendment represents a reasonable exercise of Congress' power to facilitate the proper functioning of the Selective Service System.**

1. As we have shown (*supra*, pp. 13-21), the conduct here prohibited is not demonstrably within the ambit of "symbolic speech" protected by the First Amendment, as that concept has been developed in the decisions of this Court. Thus, under well-established principles, the validity of the statute depends upon whether the governmental purpose which the legislation serves outweighs any possible, incidental intrusion on First Amendment freedoms.<sup>14</sup> See, e.g., *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 91; *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-51; *Barenblatt v. United States*, 360 U.S. 109, 126; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 461.<sup>15</sup> Here, we submit, this test is fully satisfied.

<sup>14</sup> In *American Communications Ass'n, CIO v. Douds*, 339 U.S. 382, 399, this Court delineated the approach to be taken in such situations: "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."

<sup>15</sup> Even those Justices who have regarded governmental authority to legislate in the First Amendment area as extremely narrow have recognized that a different situation is presented where acts, not words, are the subject of congressional prohibition. See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 141-142 (dissenting opinion of Mr. Justice

Under its constitutional power "[t]o raise and support Armies \* \* \*," Congress has the undoubted authority to classify and conscript manpower for military service. To that end, it may establish a system of registration of all those liable for training and service, and may reasonably require the active cooperation of those members of the citizenry subject to registration and possible induction. The issuance of draft certificates indicating the registration and classification of an individual is an administrative aid in that continuing process. Such a certificate was considered by the Congress which adopted the 1965 amendment to be "Government property". See H. Rep. No. 747, 89th Cong. 1st Sess., p. 1.<sup>16</sup> A requirement that the person to whom such a card is issued retain it in his possession at all times has been part of the Selective Service regulations for many years prior to current political controversies. See *United States v. Kime*, 188 F.2d 677 (C.A. 7), certiorari denied, 342 U.S. 823.<sup>17</sup>

Black); *Griswold v. Connecticut*, 381 U.S. 479, 507, 508 (dissenting opinion of Mr. Justice Black); *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 169, 173-174 (dissenting opinion of Mr. Justice Douglas); *Martin v. Struthers*, 319 U.S. 141, 143-144 (opinion of Mr. Justice Black, announcing the judgment of the Court).

<sup>16</sup> The Selective Service regulations similarly treat draft cards as government property by requiring their surrender to the military authorities upon induction (see 32 C.F.R. 1617.1, 1623.5).

<sup>17</sup> Administrative regulations require that the registrant have in "his personal possession at all times" his Registration Certificate (32 C.F.R. 1617.1) and his current Notice of Classification (32 C.F.R. 1623.5) (see note 4, *supra*).



It is common knowledge that a draft card serves a variety of purposes. It provides a speedy means of identification. It serves as a ready record of registration and classification, particularly useful if a draft board file is lost or misplaced. It also serves as a reminder to the registrant of his duties under the Universal Military Training and Service Act. The "Registration Certificate" advises the registrant that he must notify his local board of any change of address. The "Notice of Classification" repeats this admonition and further advises the registrant of his legal obligation to advise promptly of any changes in his physical, occupational, marital, family and other status. See *United States v. Miller*, *supra*, 367 F.2d at 80-81.<sup>18</sup> In short, under our system, whereby the manpower of the nation is classified by local boards of citizens, the draft card serves as a useful tool in the administrative process. Congress could, therefore,

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<sup>18</sup> While recognizing that the destruction of a single draft card will hardly interfere significantly with the Selective Service process, we point out that the statute here involved operates as a deterrent on all those required to carry draft cards. In this regard, the Second Circuit's admonition in *Miller* is pertinent. There that court stated (367 F.2d at 81): "Proper functioning of the system depends upon the aggregated consequences of individual acts; in raising an army no less than in regulating commerce, cf. *Wickard v. Filburn*, 317 U.S. 111, 127-128 \* \* \*, the seriousness of an individual's acts must often be assessed not only in isolation but under the assumption that they may be multiplied manifold." Congress must be assumed to have understood that, if one person might destroy his draft card, many might, and that if many did, the result would be chaotic for the Selective Service System and for the country.



*Storage Co.*, 336 U.S. 490, 498, 502; *Cox v. Louisiana*, 379 U.S. 536, 555, 379 U.S. 559, 563; *Adderley v. Florida*, 385 U.S. 39, 47-48; *Walker v. City of Birmingham*, 388 U.S. 307, 315, 316. The distinction was recently expressed by this Court in *Cox v. Louisiana*, *supra*, 379 U.S. at 555:

We emphatically reject the notion \* \* \* that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. \* \* \*

It is urged, however, that while the destruction or mutilation of draft cards admittedly constitutes conduct, it involves that special kind of conduct which falls within the category of "symbolic speech". So characterized, it is argued, draft-card burning is subject to control only if Congress meets the stringent requirements of the clear and present danger test. Cf. *Schenck v. United States*, 249 U.S. 47, 52; *Dennis v. United States*, 341 U.S. 494, 508. Simply to call conduct "speech" is not, however, enough to clothe it with constitutional protection. If it were, a wide variety of acts traditionally subjected to legislative proscription would be entitled to immunity through the simple expedient of terming them acts of "protest"—whether they took the form of defacing a public building or

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\* "Political assassination is a gesture of protest, too, but no one is disposed to work up any First Amendment enthusiasm for it." Kalven, *The Negro and the First Amendment*, p. 133 (1965).

"dumping \* \* \* garbage in front of City Hall." *United States v. Miller*, 367 F. 2d 72, 79 (C.A. 2), certiorari denied, 386 U.S. 911.<sup>6</sup> Rather, the decisive consideration is whether the conduct for which the protection is sought fits into the selective and limited class of activity which this Court has held to be so analogous to speech as to be entitled to be treated as if it actually were pure speech.

The relevant decisions of this Court indicate that the kind of conduct involved here does not fall within this narrow category. Conduct has been treated as "symbolic speech" only in situations where the acts at issue were inextricably tied to oral expression or where no reasonably effective method of communication was alternatively available. Such a situation exists where the conduct is a natural extension of the verbalization; or where, without the conduct, the oral expression would lose meaning; or where the acts are the manifest equivalent of, or traditionally recognized substitute for, a verbal statement. Hence, when a municipality attempted to impose a flag-salute requirement in its public schools, that requirement was held to offend the First Amendment because "in connection with the pledges, the flag salute is a form of utterance" which the State cannot demand

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<sup>6</sup> In *Miller* the Second Circuit squarely upheld the constitutionality of the 1965 amendment. The Eighth Circuit similarly so ruled in *Smith v. United States*, 368 F. 2d 529. After the First Circuit had decided the instant case (on April 10, 1967), and after the time for filing a petition for rehearing had expired, petitioner in *Miller* moved this Court for leave to file a petition for rehearing out of time. The Court has not yet acted on that motion.

of its citizens. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 632. In so ruling, this Court recognized that, since a pledge of allegiance is emptied of much of its ritualistic meaning when not accompanied by the time-honored ceremonial gesture of homage, the act of saluting is entitled to the same constitutional protection as speech itself. Under the same rationale, the peaceable display of a red flag or red banner, or placards in a labor dispute, has been deemed the equivalent of speech, for this is conduct which conveys, in generally understood terms, opposition to an existing government or to a particular labor-management situation. *Stromberg v. California*, 283 U.S. 359; *Thornhill v. Alabama*, 310 U.S. 588; *Carlson v. California*, 310 U.S. 106, 113. Similarly, the solemnity and sobering impact of orderly "protest by silent and reproachful presence" has been recognized as conduct which, in the context of opposition to enforced segregation, serves as a substitute for actual speech. *Brown v. Louisiana*, 383 U.S. 131, 141-142 (opinion of Mr. Justice Fortas, announcing the judgment of the Court); cf. *Garner v. Louisiana*, 368 U.S. 157, 202 (concurring opinion of Mr. Justice Harlan). Each of these cases, in short, represents an example of conduct which is the equivalent of speech, or significantly adds meaning beyond that conveyed by oral expression. As described by Mr. Justice Jackson in *Barnette, supra*, 319 U.S. at 632:

The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind \* \* \*. Associated with many of these symbols are appropriate ges-

tures of acceptance or respect: a salute, a bowed or bared head, a bended knee. \* \* \*

The holding in *N.A.A.C.P. v. Button*, 371 U.S. 415, 429-430, that the litigative activities of an organization seeking to aid the Negro in achieving his political rights is "a form of political expression" protected by the First Amendment, suggests an additional consideration related to the concept of "symbolic speech". Thus, if the proscription of certain conduct, normally and traditionally a part of peaceful advocacy, would realistically result in stifling an important—if not the only—means whereby a poorly organized or poorly represented minority can publicize its views to a broad audience, and thus enhance the opportunity for having its point of view "accepted in the competition of the market" (*Abrams v. United States*, 250 U.S. 616, 624, 630 (dissenting opinion of Mr. Justice Holmes)), greater leeway may be given to the use of action to emphasize ideas. As Mr. Justice Black stated the point in *Martin v. Struthers*, 319 U.S. 141, 146: "Door-to-door distribution of circulars is essential to the poorly financed causes of little people."

In our view, the burning of a document which plays a valid and important role in the operation of the Selective Service System does not fit into any of the foregoing concepts of conduct protected as "symbolic speech". It has no time-honored ritualistic connotation like saluting a flag. Nor is it a method for the expression of views which otherwise would not be

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<sup>7</sup> Similarly, see *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293, stating: "Peaceful picketing is the workingman's means of communication" (majority opinion of Mr. Justice Frankfurter).



properly decide that such cards ought to be protected from private mutilation and destruction, just as it might properly decide that certain records be maintained and be subject to inspection by government agents, and that the failure to keep such records can subject a person to criminal penalties (see, *e.g.*, 26 U.S.C. 6001, 7203).

2. While recognizing that a Selective Service certificate implements the proper functioning of the draft machinery (R. 62), the court below was of the opinion that the 1965 amendment was unnecessary in light of the "possession" regulation (see R. 62-63). It therefore reasoned that the statute must have been enacted to inhibit dissent rather than to prohibit conduct. That conclusion, however, does not follow from its premise. The fact that Congress adopted the 1965 amendment even though administrative regulations were in existence which could generally be utilized to punish destruction or mutilation of draft cards (but see *infra*, pp. 26-27), establishes only that Congress did not deem it sufficient to rely upon an administrative rule to bar conduct which it considered disruptive of the Selective Service system.

The legislative history makes the congressional view explicit. The congressional purpose was to fill the gap in an existing statute by "provid[ing] a clear *statutory* prohibition" so "that no question whatsoever should be left as to the intention of Congress that such wanton and irresponsible acts [*i.e.*, draft-card destruction] should be punished." H. Rep. No. 747, 89th Cong., 1st Sess., pp. 1-2 (emphasis added); see also S. Rep. No. 589, 89th Cong., 1st Sess.; 111 Cong.



Rec. 19746. Whatever may be the scope of existing administrative coverage as to a particular subject, we know of no constitutional rule that requires Congress to rely solely upon such "subordinate rules" (*Panama Refining Co. v. Ryan*, 293 U.S. 388, 429), which may be modified or revoked by administrative discretion. Insofar as a regulation punishes conduct, it does so only as a satellite of a congressional enactment. See, e.g., *United States v. Grimaud*, 220 U.S. 506, 517. It is in no way comparable to an express legislative judgment in the same area and on the same subject. Congress obviously felt that a greater deterrent impact would flow from an explicit statutory ban on draft-card destruction as contrasted to an administrative regulation which had substantially, though not identically, the same effect—just as it would be more significant to make forging, altering or making any change on the certificate a statutory offense (see 50 U.S.C. App. 462(b)(3)), even though such activities might also be covered by regulation (see 32 C.F.R. 1617.1). It has never been deemed improper for Congress to deal with various manifestations of a single unlawful transaction by a variety of regulatory controls. See, e.g., *Gore v. United States*, 357 U.S. 386, 392-393; cf. *United States v. Beacon Brass Co.*, 344 U.S. 43, 45.<sup>19</sup> Much less should Congress be deemed barred from exercising its legislative authority in a

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<sup>19</sup> This is surely true where no claim is made (as none is made here) that a registrant may be given consecutive terms of punishment for the same act of "burning" under both the "destruction" statute and the "possession" regulations.

particular way because by doing so it may overlap an existing administrative sanction.

We point out further that, even though the regulation as well as the statute could have been invoked to punish destruction or mutilation in this case (see *infra*, pp. 32-35), these provisions are not coextensive in their reach. The regulation focuses on the "status" of draft-card possession rather than pinpointing, as the statute does, the particular act which results in loss of such possession. It would thus be possible (as the court of appeals recognized in its opinion denying a petition for rehearing (R. 71)), to mutilate a card, but still possess it, as where the mutilation was not sufficiently complete to render illegible the identifying information contained on the certificate. Moreover, registrants who destroyed cards could immediately request new ones,<sup>20</sup> so that their period of non-possession might well be insignificant. There is no danger in a prosecution under the amendment, as there would be in a prosecution under the regulations, that the jury might be led to believe that the violator was being charged for the seemingly innocuous offense of temporary non-possession. By making it plain through the statutory prohibition that the ease in obtaining duplicate certificates does not provide a facile device to immunize the act of destruction, Congress has provided a deterrent to a registrant's initial

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<sup>20</sup> A local board has no authority to refuse the request for a duplicate or require that such a request be made within any particular period of time (see 32 C.F.R. 1617.11-1617.12).

act of destruction.<sup>21</sup> It is in aid of the rapid and effective mobilization of manpower to avoid imposition on the government of the administrative burdens incident to replacing draft cards which are wantonly destroyed.

3. The legislative history of the 1965 amendment does not evince a congressional motive to restrain the expression of constitutionally protected dissent. All that the history shows is that during the limited consideration of the legislation, prior to its all but unanimous enactment as law, three members of Congress—one Senator and two Representatives—indicated that the amendment was meant to serve not only a Selective Service purpose, but also to put Congress on record as considering draft-card burning to be insulting and unpatriotic.

The authoritative Senate Armed Services Committee report explained the purpose of the amendment, in pertinent part, as follows (S. Rep. No. 589, 89th Cong., 1st Sess., p. 2):

The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked *this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies* [emphasis added].

While the House report further emphasized the "deep concern" of the House Armed Services Commit-

<sup>21</sup> The regulations authorize replacement of registration certificates upon satisfactory proof that the certificate has been "lost, destroyed, mislaid, or stolen" (32 C.F.R. 1617.11 (b)).

tee that such conduct represented open defiance of governmental authority, it too stressed that "in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose \* \* \* a grave threat to the security of the Nation \* \* \*." H. Rep. No. 747, 89th Cong., 1st Sess., pp. 1-2.

There was very little floor debate on this legislation in either House. Only Senator Thurmond, Chairman of the Senate Armed Services Committee, commented on its substantive features in the Senate. In recommending its passage, he stated that it was "not fitting", while soldiers of this country "are giving their lives in combat with the enemy," that "mass public burnings of draft registration cards" should go unpunished (111 Cong. Rec. 19746). He thought such acts constituted "open defiance of the warmaking powers of the Government" and that recent acts of this kind "have demonstrated an urgent need for this legislation" (111 Cong. Rec. 20433). Without any additional substantive comments by any other Senator, the bill passed the Senate (111 Cong. Rec. 20434). In the House debate only two Congressmen addressed themselves to the amendment—Congressman Rivers, Chairman of the House Armed Services Committee, and Congressman Bray. Congressman Rivers stated, in part, that the enactment of the bill was "the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government" (111 Cong. Rec. 19871). Congressman Bray generally spoke in the same vein, criticizing



those who by these acts seek to "create fear and destroy self-confidence in our country and its citizens and to downgrade the United States in the eyes of the world" (*ibid.*). He believed the proposed legislation was "only one step in bringing some legal control over those who would destroy American freedom" (*ibid.*). At the same time, Congressman Bray noted that by destruction and mutilation of Selective Service certificates "our entire Selective Service System is dealt a serious blow" (111 Cong. Rec. 19872). No further debate was had on the amendment which passed the House by a vote of 393-to-1 (*ibid.*).

If the limited content of this debate reveals anything as to underlying congressional motive, it is that some members of Congress felt strongly that conduct such as draft-card burning was not only detrimental to the efficient operation of the Selective Service System but also reflected disrespect for the government and disdain of our servicemen in Vietnam. In short, the congressional debates at most reflect several reasons—some less constitutionally justifiable perhaps than others—for prohibiting a specific course of conduct. This is an insufficient ground for holding that an otherwise lawful statute is unconstitutional.

Indeed, it is a familiar principle of constitutional adjudication that "[s]o long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power." *Barenblatt v. United States*, 360 U.S. 109, 132; see also *United States v. Kahriger*, 345 U.S. 22, 27-30; *Daniel v. Family Security Life Insurance Co.*, 336 U.S.



220, 224; *McCray v. United States*, 195 U.S. 27, 55; cf. *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 84-87.<sup>22</sup> We recognize that this is not an inflexible precept automatically to be invoked to uphold legislation in each and every circumstance.<sup>23</sup> Rather, it is an aspect of the attitude of

<sup>22</sup> As stated by the Second Circuit in *United States v. Miller*, *supra*, 367 F.2d at 76: "[G]oing behind the terms of a statute to divine the collective legislative motive for its enactment is rarely, if ever, done by a court." Reliance was there placed on this Court's statement in *Sonzinsky v. United States*, 300 U.S. 506, 513-514, to the effect that "[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts."

<sup>23</sup> For example, where the constitutional inquiry is whether the congressional action is regulatory or penal in nature, it may be necessary to examine, among other things, into the underlying congressional motive prompting passage of the legislation. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-170; *Flemming v. Nestor*, 363 U.S. 603. But even in an inquiry of that nature only "the clearest proof" as to underlying motive will suffice to establish unconstitutionality (*id.* at 617).

Cases like *Grosjean v. American Press Co.*, 297 U.S. 233; *Lane v. Wilson*, 307 U.S. 268, and *N.A.A.C.P. v. Alabama*, 357 U.S. 449, simply hold that where the impact or reach of statutory language cannot be reconciled with the Constitution, the underlying legislative motive is immaterial. Cf. *Wright v. Rockefeller*, 376 U.S. 52, 59, 61-62 (dissenting opinion of Mr. Justice Douglas). Indeed, this Court has frequently distinguished between, on the one hand, an analysis of the effect of legislative action, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 347, and, on the other, an inquiry into the underlying purpose behind the particular legislation, e.g., *Lassiter v. Northampton County Board of Elections*, 330 U.S. 45, 53, or "into the motives of legislators," e.g., *Tenney v. Brandhove*, 341 U.S. 367, 377.

restraint which this Court has traditionally exhibited when faced with the contention that Congress has acted outside of its constitutional authority. See *United States v. Rumely*, 345 U.S. 41; *United States v. Seeger*, 380 U.S. 163, 188 (concurring opinion of Mr. Justice Douglas). Such an approach is particularly pertinent here. Application of the statute does not hinder protected methods of protest (see *supra*, pp. 13-21). On its face, the law represents a reasonable judgment by Congress that one who either "knowingly destroys" or "knowingly mutilates" a registration certificate acts to impair the effective functioning of the Selective Service System. That legislative determination should, we submit, be deemed to fall within the bounds of congressional power.

## II. Even if the Statute Is Unconstitutional, the Court of Appeals Did Not Err in Affirming Respondent's Conviction

The question posed in No. 233 need be reached only if the 1965 amendment to Section 462(b)(3) is held unconstitutional. It would then be necessary to consider whether the court of appeals properly affirmed respondent's conviction on the ground that, by burning his card, he necessarily violated the regulation requiring a registrant to have his draft card "in his personal possession at all times" (32 C.F.R. 1617.1; see also 34 C.F.R. 1623.5).

In the particular circumstances of this case, we think the result reached by the court of appeals was justified. We do not, however, rely upon the "lesser-included offense" theory propounded by the court of appeals as the basis of its decision in this regard. As

this Court has pointed out, a "lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense" *Sansone v. United States*, 380 U.S. 343, 350; *Berra v. United States*, 351 U.S. 131. The statutory crime of draft-card destruction is not a "greater offense" than the regulatory offense of non-possession, since the punishment for the commission of either offense is identical (see 50 U.S.C. App. 462(b)(6), *supra*, pp. 3-4).<sup>24</sup> Moreover, in the instant circumstances, there was no additional ingredient necessary for commission of the statutory, as opposed to the regulatory, offense. Precisely the same evidence that established knowing destruction—that petitioner burned his card so that only its "charred remains" were left—also fully made out the offense of knowing non-possession proscribed by the regulations. In short, the only basis, in our view, for sustaining the ruling of the court of appeals on this aspect of the case is that when the jury convicted respondent of knowing destruction, it necessarily found all of the facts which it would have had to find under a charge of knowing failure to possess a draft card.

In its entirety, the indictment may fairly be read as encompassing the charge of non-possession. In pertinent part, it charged that respondent "willfully and knowingly did mutilate, destroy, and change by

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<sup>24</sup> 50 U.S.C. App. 462(b)(6) provides that any person "who knowingly violates or evades any of the \* \* \* rules and regulations promulgated pursuant" to the statute shall be subject to punishment to the same extent as for a violation of a specific provision of the statute.

burning a certificate issued \* \* \* pursuant to and prescribed by the provisions of the Universal Military Training and Service Act, as amended, and the rules and regulations promulgated thereunder, to wit, a Registration Certificate \* \* \* in violation of Title 50, App., United States Code, Section 462(b)" (R. 3; emphasis added). The possession regulations (32 C.F.R. 1617.1, 1623.5) are such "rules". The fact that the indictment focused on the method by which respondent divested himself of possession does not mean that it must be construed as excluding from its terms a charge stemming from the natural consequences of the act described. In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purports to lay the charge is immaterial. See *Williams v. United States*, 168 U.S. 382; *United States v. Hutcherson*, 312 U.S. 219, 229.

Nor was there anything in the government's proof or the trial court's instructions which in any way raised any factual matters which would warrant the conclusion that, by convicting respondent of knowing destruction of his draft card, the jury did not, of necessity, also find respondent guilty of non-possession of that card. While the trial judge admonished the jury that "the crime charged is the burning of a draft card" and that "[w]e are not concerned here with anything other than this statute which prohibits the burning or mutilating of a draft card" (R. 34), each of the elements he told the jury they were required to find to establish respondent's guilt on that charge were elements which would also support his



conviction on a charge of non-possession. The court stated that the elements the government had to prove beyond a reasonable doubt were, "one, that the defendant O'Brien burned his draft card and two, that he did it intentionally knowing that it was a wrongful act" (R. 34). A finding that these two elements were present would necessarily show intentional non-possession of the card.<sup>25</sup>

Thus, this case is distinguishable from *Cole v. Arkansas*, 333 U.S. 196. There, the defendants were charged and convicted under Section 2 of a statute which prohibited persons (1) from assembling near a place where a labor dispute existed and by force and violence preventing a person from engaging in a lawful vocation, and (2) from acting in concert to promote any such unlawful assemblage. The trial judge charged the jury that the defendants could not be convicted unless they were found to have promoted an *unlawful assemblage* for the purpose of preventing a named individual from engaging in a lawful vocation. On appeal, the Supreme Court of Alabama upheld the conviction under Section 1 of the statute which prohibited the use of force and violence to prevent a person from working. The State court thus found it unnecessary to reach any questions of constitutional validity or sufficiency of proof as to assemblage. This Court reversed, finding that the conviction on the re-

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<sup>25</sup> While the evidence indicated there were "charred remains" (R. 11, 15-16) and "fragments" (R. 17) of respondent's draft card left after the burning (see R. 52-53), it seems clear that the court of appeals was correct in concluding that "[m]anifestly defendant no longer 'possessed' what could properly be said to constitute a draft card (R. 71).



lated charge could not be sustained "[w]ithout completely ignoring the judge's charge [under which] the jury could not have convicted petitioners for having committed the separate, distinct, and substantially different offenses defined in § 1" (333 U.S. at 200). The court of appeals' affirmance here does not have the effect of reading an important element out of the case, as in *Cole v. Arkansas*. As a matter of common sense, the very act of purposefully burning a draft card until it is wholly charred results in intentional non-possession of the document.

Nor does respondent demonstrate any prejudice by the affirmance of his conviction for having violated the "possession" regulation. His decision to waive counsel at trial could not fairly be said to have been influenced by the citation of a particular violation in the indictment. Not only is it plain that he had the advice of experienced and able counsel on all phases of the constitutional issues, but the facts, which showed non-possession as well as burning, were conceded. Nor is there support for an argument that respondent might have followed different strategy if the indictment had charged non-possession in express terms. As the court below noted (R. 64), the defense memorandum seeking to dismiss the indictment on constitutional grounds challenged the overall requirement that a registrant retain his draft card.<sup>26</sup>

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<sup>26</sup> This memorandum argued, in pertinent part (R. 6):

"To rely upon individuals having draft cards in their possession as a means of operative [sic] the selective service system would seem to be impractical if not down-

In sum, if the Court deems it necessary to reach this ruling of the court of appeals, we submit that it should be upheld.

### CONCLUSION

For the reasons stated in Point I, *supra*, it is respectfully submitted that the judgment of the court of appeals holding the statute unconstitutional should be reversed and the judgment and sentence of the district court should be reinstated. If, however, the Court finds that the court of appeals' ruling as to unconstitutionality was correct, it should affirm the judgment below for the reasons stated in Point II, *supra*.

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DECEMBER 1967.

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right dangerous. \* \* \* Whether Defendant O'Brien has had his draft card in his possession, whether he burned [or] mutilated [it] or whatever, will have little or no effect upon the selective service system."



**LIBRARY**  
**SUPREME COURT, U. S.**

**IN THE**

**Supreme Court of the United States**

**OCTOBER TERM, 1967**

**Nos. 232 and 233**

**FILED**

**JAN 10 1968**

**JOHN F. DAVIS, CLERK**

**UNITED STATES OF AMERICA,**

**—v.—**

**DAVID PAUL O'BRIEN,**

*Petitioner,*

*Respondent.*

**DAVID PAUL O'BRIEN,**

**—v.—**

**UNITED STATES OF AMERICA,**

*Petitioner,*

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT**

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**BRIEF FOR DAVID PAUL O'BRIEN,  
RESPONDENT IN NO. 232  
PETITIONER IN NO. 233**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1967

Nos. 232 and 233

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UNITED STATES OF AMERICA,

*Petitioner,*

—v.—

DAVID PAUL O'BRIEN,

*Respondent.*

DAVID PAUL O'BRIEN,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT

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**BRIEF FOR DAVID PAUL O'BRIEN,  
RESPONDENT IN NO. 232  
PETITIONER IN NO. 233**

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**Questions Presented**

1. Whether the August 30, 1965 amendment to Section 12(b)(3) of the Universal Military Training and Service Act, 50 U. S. C. App. §462(b)(3), which made it a felony to knowingly destroy or knowingly mutilate a Selective Service certificate, is an unconstitutional abridgment of freedom of expression guaranteed by the First Amendment,

on its face, because the legislative history unequivocally reveals that it was deliberately enacted for the purpose of suppressing dissent.

2. Whether the statute, as applied to the facts in this case, is an unconstitutional abridgment of freedom of expression because the conduct which it sought to punish was a peaceful act of symbolic speech protected under the clear and present danger test, and likewise protected under the balancing test.

3. Whether the statute serves any legitimate purpose in the administration of the Selective Service System, or any other rational legislative purpose, and whether, in the absence of any legitimate or rational legislative purpose, the statute is an unconstitutional deprivation of individual liberty without due process of law, in violation of the Fifth Amendment.

4. Whether the Court of Appeals was correct in holding respondent guilty of a violation of the regulation proscribing non-possession of a Selective Service certificate, for which he was neither indicted, nor tried, nor convicted in the trial Court on the theory of lesser included offense.

5. Inasmuch as the Government concedes that the lesser included offense theory was improperly applied by the Court of Appeals, whether the respondent can be held guilty by the alternative theory advanced by the Government in this Court.

6. Whether in any event the respondent can be held guilty, for a crime for which he was neither indicted, nor tried, nor convicted, on any theory, without violating his

constitutional right to due process of law, under the principles of *Cole v. Arkansas*, 333 U. S. 196 (1948).

7. Whether determination by this Court of the constitutionality of the Selective Service regulation requiring possession of a Selective Service certificate and penalizing non-possession, which was at most only intimated at in the proceedings below, is necessary in order to decide this case, and if so, whether it would not be more appropriate to remand the case so that such question can be properly and carefully developed before being decided by this Court.

8. Whether the imposition of a sentence of an indeterminate term of imprisonment, whose maximum is four years imprisonment and an additional two years of conditional release under the supervision of the Attorney General, for the act of burning a Selective Service certificate, is punishment so shockingly excessive, disproportionate, cruel, unusual and inhumane as to constitute cruel and unusual punishment in violation of the Eighth Amendment.

9. Whether the imposition of an indeterminate sentence of up to six years under the Federal Youth Corrections Act, in punishment for the burning of a Selective Service Registration Certificate as a symbolic expression of protest against war, accompanied by statements of the sentencing judge that the duration of the confinement will depend on the defendant's changing his beliefs and associations, is an unconstitutional abridgment of freedom of expression and association protected by the First Amendment, and constitutes cruel and unusual punishment forbidden by the Eighth Amendment.

## **Constitutional Provisions, Statutes and Regulations Involved**

Section 12(b) of the Universal Military Training and Service Act, 50 U. S. C. App. §462(b), as amended, 79 Stat. 586, is set forth on page 3 of the Government's brief.

Portions of 32 C. F. R. §§1617.1 and 1623.5 are set forth on page 4 of the Government's brief.

This case also involves the First, Fifth and Eighth Amendments to the United States Constitution:

**Amendment I**—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Amendment V**—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**Amendment VIII**—Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.



Likewise involved, should the Court reach the question of sentencing, are the following provisions of the Federal Youth Corrections Act, Title 18 U. S. C. §5006(e), (f) and (g); §5010(b); and §5017(c):

§5006(e) "Youth offender" means a person under the age of twenty-two years at the time of conviction;

(f) "Committed youth offender" is one committed for treatment hereunder to the custody of the Attorney General pursuant to section 5010(b) and 5010(c) of this chapter;

(g) "Treatment" means corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders;

§5010(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017(c) of this chapter;

§5017(c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

### Statement of the Case

The Statement in the Government's brief, pages 4 through 7, sets forth the basic chronological events with accurate record references. In respondent's view, the following additional facts are of significance to the various issues in this case:

Respondent's public burning of a Selective Service certificate, outside of the South Boston courthouse, was open, unconcealed, and in the presence of a large gathering of spectators. News media, television and newspaper men were present (R 8). Many of the spectators were hostile to respondent, and this expression on his part resulted in efforts to physically assault him by some of the hostile persons (R 10).

Respondent described to the jury the reason for the ceremonial burning as follows:

"I am a pacifist and as such I cannot kill, and I would not cooperate.

I later began to feel that there is necessity, not only to personally not kill, but to try to urge others to take this action, to urge other people to refuse to cooperate with murder.

So I decided to publicly burn my draft card, hopefully so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position.

And I don't contest the fact that I did burn my draft card, because I did.

It is something that I felt I had to do, because I think we are basically living in a culture today, a so-

ciety that is basically violent, it is basically a plagued society, plagued not only by wars, but by the basic inability on the part of people to look at other people as human beings, the inability to feel that we can live and love one another, and I think we can (R. 29).

• • • • •

So in this sense I think we are all on trial today. We all have to decide one way or the other what we want to do, whether we are going to accept death or whether we will fight to sustain life" (R. 30).

There was no dispute below as to any of the facts of the burning of the certificate. However, whether or not these conceded facts can lawfully support a conviction for non-possession as a matter of law, as well as the constitutionality of the possession regulation, are questions which were not raised in the appeal, nor at the trial, and only inferentially referred to in a pre-trial motion to dismiss (R. 5-6).

The decision of the Court of Appeals essentially held the burning statute unconstitutional on two grounds. On First Amendment grounds it held that the statute was designed to abridge freedom of speech, and that it was in effect an impermissible abridgment of symbolic speech protected by the First Amendment (R. 62-63). It also held the statute to be devoid of any proper legislative purpose (R. 62). In applying the doctrine of lesser included offense to affirm respondent's conviction, it assumed the constitutionality of the non-possession requirement without discussion.<sup>1</sup>

<sup>1</sup> The only case cited is *United States v. Kime*, 188 F. 2d 677 (7th Cir. 1951), cert. den. 342 U. S. 823. The *Kime* decision does affirm that the non-possession regulation is constitutional but only

Respondent respectfully suggests that the issue of constitutionality of non-possession is not ripe for decision in this Court because it was not briefed and argued below. Indeed it was never anticipated that the Court of Appeals might rule as it did. Respondent therefore urges that this Court should decide this case purely on the question of the constitutionality of the 1965 amendment. However, if it is deemed necessary to consider the much more complicated constitutional questions involved with regard to the non-possession regulation, it is, in that event, respectfully suggested that the matter be remanded for reargument on such question.<sup>2</sup>

The court below vacated the sentence and remanded for resentencing because of its concern that the application of an unconstitutional statute may have aggravated the sentence (R. 65).

However, the Court of Appeals did not rule on two questions presented to it concerning the sentence. Consequently, should this Court reverse the Court of Appeals and hold the statute constitutional there will once again be presented the propriety of the term and the manner of imposition of the sentence.

Violation of the "anti-burning" statute is a felony, with a maximum penalty of five years imprisonment and \$10,000 fine. 50 App. U. S. C. §462(b). The Government had rec-

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as part of a holding that the entire conscription statute is constitutional. It contains very little discussion of the constitutional questions raised in this case, or the constitutional questions which might be raised in any prosecution for symbolic non-possession. See Point V, *infra*.

<sup>2</sup> Nevertheless, it is apparent that some but not all of the constitutional questions involved in the burning statute will also be involved in the non-possession regulation. See Point V, *infra*.

ommended two years imprisonment (R. 45). The District Judge, however, saw fit to sentence respondent under a provision of the Federal Youth Corrections Act, 18 U. S. C. §5010(b), which carries a maximum penalty of six years under the custody of the Attorney General, the first four years of which may be prison incarceration (R. 58). See 18 U. S. C. §5017(c).

During the pre-sentence discussion with the respondent and his father, the District Court indicated that its purpose was to utilize the treatment and rehabilitative procedures of the Youth Corrections Act to the end that the respondent would "disassociate yourself from certain activities and otherwise lead a normal life" (R. 37). The Court characterized what appellant did as "such a silly gesture" (R. 38). It strongly implied that the persons with whom appellant was "associated with in this youth movement" could not give him "good advice" (R. 38). [Respondent identified his organization as the Committee for Non-Violent Action, and pointed out that it was "not a youth movement" (R. 38).] Respondent also stated that he had acted entirely on his own. "They haven't advised me to do anything" (R. 39).

The Court suggested that respondent's "good friends" were pushing him forward "to have his head cut off" (R. 40). Respondent denied this and said that he didn't want to be a martyr (R. 40), and that he didn't want to go to jail (R. 39).

The Court stated that the purpose of a sentence under the Youth Corrections Act was to cause respondent "to undo what he has done that is wrong" (R. 41). It stated further that he would not have to serve the full six years under the Youth Act, unless "you are such a hardened case that



they can't do anything with you" (R. 42). The Court stated it hoped that respondent would change his attitude "if you were removed from the influence of these friends of yours" (R. 42).

Respondent's father was present in court during the discussion and imposition of sentence and had indicated concurrence with the Court's sentiments (R. 39, 40, 41, 42). Finally, the court imposed the six year maximum sentence, observing "I have discussed this with you and your father, and I have given you every opportunity to recognize and try to correct your violation of the law. \* \* \* [T]his must be a government of law, and not individual opinions" (R. 47).

### Summary of Argument

#### I.

The legislative history of the 1965 amendment to the Universal Military Training and Service Act which made it a felony to wilfully mutilate or wilfully destroy a Selective Service certificate reveals the clearly unconstitutional Congressional purpose of suppressing dissent. It does not reveal any other purpose, much less any rational purpose. Chronological examination of the legislative history establishes such Congressional purpose beyond any doubt. It is appropriate for this Court to examine legislative history to determine if there was an unconstitutional congressional purpose. The Government confuses the propriety of examining legislative purpose, as revealed through authoritative statements of committee chairman and other appropriate sources, with the unrevealed motivations of individual Congressmen. The court below correctly found that there

was no proper legislative purpose, and that the only legislative purpose revealed was manifestly unconstitutional. The statute cannot be saved by giving it a narrow reading.

## II.

The Court of Appeals correctly characterized the statute as attempting to restrict "symbolic speech", which has long been recognized under decisions of this Court, starting with *Stromberg v. California*, 283 U. S. 359 (1931) and *West Virginia State Board of Education v. Barnette*, 319 U. S. 624 (1943). The Government's attempt to develop a rationale which would severely circumscribe symbolic speech, and make the doctrine unavailable in this case is not in accord with the decided cases. Moreover, even under the Government's rationale, the conduct proscribed by the anti-burning amendment would still be protected under the First Amendment. Decisions of this Court have held that there is a constitutional right to deliver one's speech at the place where, the time when, and the manner in which the speaker deems it to be most effective. This includes dramatizing one's speech via a symbolic act such as the burning of a piece of paper. The only limitation is the proper constitutional test. Respondent suggests that the proper test is the clear and present danger test, but even if the *ad hoc* balancing test is to be applied, the statute must still be set aside as unconstitutional. The various justifications of the statute's usefulness proposed by the government indicate at most some benefit for the Selective Service registrant, and only the most remote contingent benefit for the Government. No justification of the statute's usefulness or desirability that has been expressed by the Selective Service system or any other branch of Government has been set forth, and in fact there is none.

## III.

In addition to being in violation of the First Amendment, the statute is a deprivation of substantive due process under the Fifth Amendment, in accordance with the principles laid down in *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), and *Meyer v. Nebraska*, 262 U. S. 390 (1923), and recently reiterated in *Griswold v. Connecticut*, 381 U. S. 479 (1965). The ordinary presumption of constitutionality of a legislative act does not exist when the legislation infringes on freedom of speech. Substantive due process places limits on all government power, including the war power.

## IV.

The Court of Appeals erroneously applied the lesser-included offense doctrine when it held respondent guilty of non-possession, after it found the anti-burning statute unconstitutional. The lesser-included offense doctrine does not apply because the indictment did not include several elements necessary to charge non-possession. The Government concedes that the court below erred and suggests that the respondent be held guilty in this Court on the theory that the indictment may fairly be read as encompassing the charge of non-possession. The government's theory is based on a misreading of decisions of this Court and is not supported by the charge given to the jury. In any event, the principle of *Cole v. Arkansas*, 333 U. S. 196 (1948), that conviction upon a charge not made is a denial of due process compels reversal of the conviction and dismissal of the indictment.

## V.

The court below assumed the constitutionality of the non-possession regulation although the various constitutional questions raised thereby were not systematically argued and briefed by either side. If this Court agrees with respondent's arguments in Points I through IV, it is not necessary to decide the constitutional question of non-possession. However, should this Court feel that final decision of this case should not be made until the constitutionality of non-possession is determined, it is suggested that remand would be appropriate.

## VI.

By imposing an indeterminate sentence with a six-year maximum for the offense of burning a Selective Service certificate, the District Court imposed punishment so excessive and disproportionate as to constitute a violation of the Eighth Amendment. Furthermore, by its presentencing and sentencing remarks to the effect that the term of imprisonment and its duration would be conditioned on respondent's abandoning his anti-war and anti-draft beliefs and associations, the First Amendment was likewise violated. Inasmuch as the Court below vacated the sentence and ordered resentencing where "impermissible factors" introduced by the unconstitutional statute would not be presented, the foregoing questions concerning duration and manner of sentence will only be before this Court should it reverse the Court of Appeals' holding that the anti-burning statute is unconstitutional.

## POINT I

**The 1965 amendment to the Universal Military Training and Service Act which made it a felony to willfully mutilate or willfully destroy a Selective Service certificate is an unconstitutional abridgment of freedom of speech guaranteed by the First Amendment because the legislative history unequivocally reveals a deliberate congressional intent to suppress freedom of speech, and a lack of any rational legislative purpose.**

Incensed by reports of draft card burnings by young men who were thereby symbolically expressing their opposition to the Vietnam war and the draft, Congress hurriedly amended the Universal Military Training and Service Act to make it a felony to knowingly destroy or knowingly mutilate a Selective Service certificate. There were no legislative hearings. There were no requests for the legislation by the Selective Service System, or by any other agency concerned with national defense or military manpower. Nor were their views or comments solicited. The only legislative purpose, unequivocally expressed by statements of the sponsors and by committee reports in both houses, was to punish this form of symbolic dissent.

The Court of Appeals acknowledged the clearly revealed unconstitutional purpose and invalidated a statute which, by its legislative history, was self-evidently a law abridging freedom of speech. The Court noted that the amendment singled out "persons engaging in protests for special treatment," and that such legislation "strikes at the very core of what the First Amendment protects" (R. 63). It characterized the statute as being in the category of those which "go beyond the protection of those [legiti-



mate] interests to suppress expressions of dissent" (R. 63). It noted that the impact of the statute "on certain expressions of dissent is no mere random accident, but quite obviously the product of design" (R. 63, fn. 7).

Finally, it stated that it ~~was~~ vacating the sentence because of its concern that the Court might have been influenced in the imposition of sentence by the same "impermissible factors" as Congress, the effect of which "would be to punish defendant . . . for exactly what the First Amendment protects" (R. 65).

The Government's brief attempts to throw some doubt upon the legislative history by suggesting that several purposes were intended to be served "some less constitutionally justifiable perhaps than others . . . ." (Government's brief, p. 29). The Government concedes that one of the purposes was to declare draft card burning "insulting and unpatriotic" (*Id.* at 27).

A review of the entire legislative history, however, reveals that an intention to punish draft card burning because it was deemed "insulting and unpatriotic" was the only purpose. The legislative history is presented chronologically in the next section of this brief, and the entire documentation of legislative history is set forth *in haec verba* as an appendix, *infra*.<sup>3</sup>

<sup>3</sup> The Government refers to the sparseness of the legislative history as strengthening its case, presumably on the theory that the legislative history is so brief that it is difficult to ascertain Congressional purpose. But in fact the reverse is true. The compactness of the legislative history, the fact that only a limited number of persons addressed themselves to the bills, and that each of them reiterated the same unconstitutional purpose makes a much clearer case for unconstitutionality than if there were a lengthier history containing less unanimous statements of purpose.

### A. Examination of the legislative history.<sup>4</sup>

On August 5, 1965, Representative L. Mendel Rivers (Dem.-S. C.) introduced H.R. 10306 providing for the amendment of §12(b)(3) of the Universal Military Training and Service Act of 1951, Title 50, App., U. S. C. §462 (b)(3), as follows:

"(3) who forges, alters, *knowingly destroys, knowingly mutilates*, or in any manner changes any such certificate or any notation duly and validly inscribed thereon;" (Proposed amendment italicized).

On August 9, 1965, H.R. 10306 was favorably reported to the Committee of the whole House by the House Committee on Armed Services and Representative Rivers submitted House Report No. 747, 89th Congress, 1st Session in connection with the bill (p. 1a, *infra*). The House Report states that the amendment is not intended to protect against the destruction of government property, but rather to suppress open defiance of governmental authority:

"The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidence in which individuals and large groups of individuals openly defy and encourage others to defy the author-

<sup>4</sup> On the importance of legislative materials in determining statutory purpose, see *Galvan v. Press*, 374 U. S. 522, 526-8 (1954) (sponsor, floor debates, subsequent memorandum of sponsor as "weighty gloss"); *NLRB v. Denver Building & Construction T. Council*, 341 U. S. 675, 686-9 (1951) (sponsor, Conference Report); *Elder v. Brannan*, 341 U. S. 277, 284-6 (1951) (author, Committee Chairman, Reports, Hearings); *Ahrens v. Clark*, 335 U. S. 188, 191-192 (1947) (Senate Manager, floor discussion); *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643, 648 (1931) (entire Congressional history).

ity of their Government by destroying or mutilating their draft cards.

"While the present provisions of the Criminal Code with respect to the destruction of Government property may appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished" (p. 2a, *infra*).

On August 10, 1965, Representative Rivers, speaking in the House in support of the bill, stated:

"The purpose of the bill is clear. It merely amends the draft law by adding the words 'knowingly destroys and knowingly mutilates' draft cards. A person who is convicted would be subject to a fine up to \$10,000 or imprisonment up to 5 years. It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards.

"We do not want to make it illegal to mutilate or destroy a card per se, because sometimes this can happen by accident. But if it can be proved that a person knowingly destroyed or mutilated his draft card, then under the committee proposal, he can be sent to prison, where he belongs. This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government." (Congressional Record—House, August 10, 1965, at 19135) (p. 6a, *infra*).

Representative Bray (Rep.-Ind.), in support of the bill, eloquently delineated its purpose: it was to suppress expressions of contempt for the United States, to punish those who disrespect American institutions, to facilitate a rebirth of patriotic sentiment, and to end toleration of evil. In the words of the Congressman:

"The need of this legislation is clear. Beatniks and so-called 'campus-cults' have been publicly burning their draft cards to demonstrate their contempt for the United States and our resistance to Communist take-overs. Such actions have been suggested and led by college professors—professors supported by taxpayers' money."

"These so-called 'student' mobs at home and abroad make demands and threats; they hurl rocks and ink bottles at American buildings; they publicly mutilate or burn their draft cards; they even desecrate the American flag. Chanting and screaming vile epithets, these mobs of so-called 'students' and Communist 'stooges' attempt to create fear and destroy self-confidence in our country and its citizens and to downgrade the United States in the eyes of the world.

"Such organized 'student' groups in the United States have sent congratulations and money to Ho Chi Minh and have made anonymous and insulting calls to families of our servicemen killed in Vietnam.

"This proposed legislation to make it illegal to knowingly destroy or mutilate a draft card is only one step in bringing some legal control over those who would destroy American freedom. This legislation, if passed, will be of some assistance to our country if the officers

and courts charged with the enforcement of the law will have the energy, courage, and guts to make use of it.

"The growing disrespect for our law and institutions in America holds a real threat to our country and to our freedom. Just 5 short years ago no one would have believed that disrespect for our country could have grown to the proportions that it has today."

"One of America's greatest sources of strength in discouraging these demonstrations is to pause and consider the greatness of America—to appreciate what our country has done for the benefit of mankind. Let us be proud, possessed not of an arrogant pride, but a humble pride in our greatness, in our heritage" (pp. 7a-8a, *infra*).

Without benefit of any additional debate (save the comments of Congressmen Rivers and Bray), on August 10, 1965, with 393 yeas votes against a solitary negative, the bill passed the House.

On that same day Senator Strom Thurmond (Rep. S. C.), introduced an identical bill in the Senate, and stated:

"Mr. President, recently the public and officials of our country have been appalled by reports of mass public burnings of draft registration cards. It is not fitting for our country to permit such conduct while our people are giving their lives in combat with the enemy" (Congressional Record—Senate, August 10, 1965, at 19012) (p. 16a, *infra*).



On August 12, 1965, with a technical amendment as to section numbering, the Senate Committee on Armed Services favorably reported the proposed amendment and submitted Senate Report No. 589, 89th Congress, 1st Session (p. 17a, *infra*) in support of the bill. The Committee explained that the bill was directed at political dissenters. It stated:

"The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies" (p. 18a, *infra*).

On August 13, 1965, Senator Thurmond remarked on the Senate floor:

"Recent incidents of mass destruction of draft cards constitute open defiance of the warmaking powers of the Government and have demonstrated an urgent need for this legislation."

"Such conduct as public burnings of draft cards and public pleas for persons to refuse to register for their draft should not and must not be tolerated by a society whose sons, brothers, and husbands are giving their lives in defense of freedom and countrymen against Communist aggression" (Congressional Record—Senate, August 13, 1965, at 19669) (pp. 20a-21a, *infra*).

With no more before it than the Senate Committee Report, and the pithy statements of Senator Thurmond, the Senate adopted the bill without objection on August 13, 1965 (p. 21a, *infra*).

Thus, within the space of eight days, without hearings, with two short Committee Reports and with floor statements by two Representatives and one Senator, the amendment was literally hurried through Congress. Fifteen days later, on August 30, 1965, H. R. 10306 received Presidential approval and became Public Law 89-152, 79 Stat. 586.

It would be hard to find a statute whose legislative history more succinctly and unanimously sets forth the purpose sought to be achieved. The evil at which the statute is directed is "open defiance" and "contempt" for governmental authority expressed by "dissident persons who disapprove of national policy." A more obviously illegitimate purpose could hardly be devised. The legislative history bears all the hallmarks of a frenzied rush to suppress dissent. There was no free and fearless debate, no sober reflection and reasoning heard in the halls of Congress. There was only a single point of view expressed, and it went unchallenged except for one solitary, albeit unexplained, negative vote.

Unanimity of viewpoint, hurried enactment, and imposition of heavy criminal punishment for political dissent emblazon the amendment with the typical characteristics of oppression. Furthermore, the statute's purpose is superficially and clumsily disguised, so as to present the appearance, despite its unconstitutional purpose, of innocuous legitimacy. It wears the dress of innocent language in transparent attempt to avoid the broad proscriptions of the First Amendment.

This is hardly the first instance recorded in American jurisprudence where unconstitutional laws have been enacted under a hypocritical cloak of propriety. The English sought to suppress the American colonists' speech, not

directly, but through stamp taxes. Cf. *Grosjean v. American Press Co.*, 297 U. S. 233 (1936). States have sought to curtail civil rights activity, not directly, but through improper prosecutions, see *Cox v. Louisiana*, 379 U. S. 536 (1965); or through corporate registration schemes, see *N. A. A. C. P. v. Alabama*, 357 U. S. 449 (1958). Illustrations of attempted repression by indirection are, unfortunately, numerous, ranging from anti-Negro grandfather clauses, *Lane v. Wilson*, 307 U. S. 268 (1939), to anti-oriental laundry ordinances, *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), to "white only" membership qualifications, *Nixon v. Condon*, 286 U. S. 73 (1932).

But the devious manner in which the statute achieves its illegitimate end does not render its objective any less invalid. To paraphrase Mr. Justice Frankfurter: The First Amendment "nullifies sophisticated as well as simple-minded modes of" suppressing speech. *Lane v. Wilson*, *supra*.

### **B. The propriety of examining legislative history.**

The Court of Appeals was plainly correct in reading the legislative history to determine if the Congressional purpose was unconstitutional and concluding, in fact, that it was. It cited *Grosjean v. American Press Co.*, 297 U. S. 233 (1936) and *Gomillion v. Lightfoot*, 364 U. S. 339 (1960) (R. 63, fn. 7).

*Grosjean* is particularly appropriate because a newspaper advertising tax statute, pushed through the Louisiana legislature by the administration of Senator Huey P. Long was held by this Court to be an unconstitutional violation of freedom of the press. The tax was deliberately designed to affect large city newspapers, but not rural

newspapers "... with the plain purpose of penalizing the publishers. ..." 297 U. S. at 251.

Mr. Justice Sutherland, for a unanimous court, held that the tax was unconstitutional "... because in the light of its history and its present setting it is seen to be a deliberate and calculated device in the guise of a tax ..." in violation of "constitutional guarantees." *Ibid.*<sup>5</sup>

In *Gomillion v. Lightfoot*, *supra*, this Court held that a statute must be declared unlawful if its *purpose* is the attainment

<sup>5</sup> That this Court was fully apprised of the "plain purpose" and "present setting" of the tax statute is evident from Appellees' Brief in that case:

"The newspapers published by the appellees have, from time to time, in their editorials, severely criticized the political practices and policies of the 'Long Faction' and for some time prior to, and during, the Regular Session of the 1934 Legislature there had been open and vigorous opposition by said newspapers to the policies and practices of said faction. The leaders and various members of said faction, during said time, openly and vehemently denounced said newspapers in political addresses and speeches on the floor of the Legislature, and in circulars widely distributed through employees of the various State departments under their control, and threatened the newspapers with taxation on their advertising (R. 42).

"During said Regular Session of the Legislature of 1934 after the introduction and prior to the final passage of Act No. 23, a circular was issued over the names of Governor Oscar K. Allen and the late Senator Huey P. Long, and was widely distributed throughout the State. Copies thereof were laid on the desk of each member of the Legislature during its Regular Session of 1934 while said Act No. 23 was under consideration. This circular contained the following language:

"The lying newspapers are continuing a vicious campaign against giving the people a free right to vote. We managed to take care of that element here last week. A tax of 2% on what newspapers take in was placed upon them. That will help their lying some. Up to this time they have never paid any license to do business like everybody else does. It is a system that these big Louisiana newspapers tell a lie every time they make a dollar. This tax should be called a tax on lying, 2¢ a lie' (R. 43)."

of an unconstitutional end. See *Lamont v. Postmaster General*, 381 U. S. 301 (1965) affirming, *sub nom. Heilberg v. Fixa*, 236 F. Supp. 405 (N. D. Calif. 1964); *N. A. A. C. P. v. Alabama*, 357 U. S. 449 (1958); *Lane v. Wilson*, 307 U. S. 268 (1939); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

The Government, on pages 29 to 31 of its brief, challenges the propriety of the First Circuit's reading of the legislative history, in the first instance by citing a number of cases where this Court has held that it is improper to examine Congressional "motives."

By the use of the word "motive" the Government confuses the essential difference between that which motivates an individual legislator to cast his vote, and the formal expression of collective legislative purpose via Committee reports, sponsors' explanatory statements, and similar authoritative sources. This distinction was elucidated by Circuit Judge Soper in *National Association for the Advancement of Colored People v. Patty*, 159 F. Supp. 503, 515, n. 6 (E. D. Va. 1958); rev'd on other grounds, *sub nom. Harrison v. N. A. A. C. P.*, 360 U. S. 167 (1959):

"While it is well settled that a court may not inquire into the legislative motive (*Tenney v. Brandhove*, 341 U. S. 367, 377, 71 S.Ct. 783, 95 L.Ed. 1019), it is equally well settled that a court may inquire into the legislative purpose. (See *Baskin v. Brown*, 4 Cir., 174 F. 2d 391, 392-393, and *Davis v. Schnell*, D. C., 81 F. Supp. 872, 878-880, affirmed 336 U. S. 933, 69 S. Ct. 749, 93 L.Ed. 1093, in which state efforts to disenfranchise Negroes were struck down as violative of the Fifteenth Amendment.) Legislative motive—good or bad—is irrelevant to the process of judicial review; but legisla-



tive purpose is of primary importance in determining the propriety of legislative action, (since the purpose itself must be within the legislative competence, and the methods used must be reasonably likely to accomplish that purpose. Because of this necessity, a study of legislative purpose is of the highest relevance when a claim of unconstitutionality is put forward. Usually a court looks into the legislative history to clear up some statutory ambiguity, as in *Davis v. Schnell*, D. C., 81 F. Supp. at page 878; but such ambiguity is not the *sine qua* for a judicial inquiry into legislative history. See the decision in *Lane v. Wilson*, 307 U. S. 268, 59 S.Ct. 872, 83 L.Ed. 1281, in which the Supreme Court showed that the state statute before the court was merely an attempt to avoid a previous decision in which the 'grandfather' clause of an earlier statute had been held void."

The majority Judges in the 5th Circuit in *Gomillion* held themselves barred from examining what they referred to as the legislative motive. To this, Judge Brown responded:

"What the Legislature of Alabama, as distinguished from its members, *intended* and what the *purpose* of

<sup>6</sup> Cf. Mr. Justice Douglas' concurring opinion in *N. A. A. C. P. v. Button*, 371 U. S. 415, 445-446 (1963):

"The Virginia Act \* \* \* reflects a legislative purpose to penalize the NAACP because it promotes the desegregation of the races.

"\* \* \* Judge Soper, writing for the Court in *NAACP v. Patty* \* \* \* did not indulge in guesswork. He reviewed the various steps taken by Virginia to resist our *Brown* decision \* \* \* [T]hey made clear the purpose of the present law—as clear a purpose to evade our prior decision as was the legislation in *Lane v. Wilson* \* \* \*"

the Legislature, as distinguished from its members, was in the enactment of this law is then a traditional matter for concern to the Judiciary. Obviously the Legislature of Alabama could have had the purpose of discriminating against Negro voters. Many states have had such purpose as the cases discussed . . . attest. All that Doyle can mean is that in the judicial process of ascertaining *legislative* purpose and intention the individual motives and expression of the individual members is not pertinent. But where the collective purpose and intention of the body is expressly stated or is ascertained on a trial by the exercise of traditional rules of statutory construction in the light of record facts, the judicial ascertainment and declaration of that purpose and intention is not prohibited by the fact that individual legislators, either in legislative chambers or through the press, may have uttered statements of startling candor." (Footnote omitted.) *Id.* at 610.

Statements of precisely such "startling candor" were uttered by Representative Rivers and Senator Thurmond, the two Committee Chairmen,<sup>7</sup> in enacting the statute here under attack. The First Circuit recognized these statements as the embodiment of Congressional purpose and declared the statute unconstitutional.

<sup>7</sup> The remarks of Rep. Bray were even more candid. See, *supra*, p. 18. The Government's brief makes occasional references to the fact that statements indicating unconstitutional purpose were made by "only two" Representatives (p. 28) and were confined to "three members of Congress" (p. 10). But the inescapable fact is that all three of them expressed the same purpose, and no one expressed any other purpose.

The cases cited in the Government's brief on this point either involved a confusion of motivations and consequently the impossibility of ascertaining true intentions, *United States v. Kahriger*, 345 U. S. 22 (1953); *Daniel v. Family Security Life Insurance Co.*, 336 U. S. 220 (1949); *Sonzinsky v. United States*, 300 U. S. 506 (1937); cases where the court, after its study of the legislative history, determined that the Congressional purpose was not unconstitutional, *Communist Party v. Subversive Activities Control Board*, 367 U. S. 1 (1961); see *Flemming v. Nestor*, 363 U. S. 603 (1960); or cases where the court applied the axiomatic principle that it would not rule on the wisdom of legislative acts; see *McCray v. United States*, 195 U. S. 27, 55 (1904).

Elsewhere the Government misreads or confuses the difference between Congressional motive and Congressional purpose. *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 169 (1963) has nothing to do with divination of Congressional motives; what it did hold was that "objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive." The Government's suggestion that in *Grosjean v. American Press Co.*, *supra*, this court held the underlying legislative motive to be immaterial (Brief, p. 30, footnote 23) is rebutted by a reading of the case which shows that the court was most concerned with the legislative purpose.<sup>8</sup>

<sup>8</sup> The second paragraph of footnote 23 on page 30 of the Government's brief contains several confusing references to "purpose" and "motive". It suggests that the only distinction is between "the effect of legislative action" on the one hand, and purpose or motive, used interchangeably, on the other hand. That purpose and motive refer to two completely different concepts is demonstrated by the decisions discussed above. In support of this confusion, however,

The Government's final argument is that the Court should give the statute a narrow construction to avoid a holding of unconstitutionality, citing *United States v. Rumely*, 345 U. S. 41 (1953), where the Court "strained words" to save a statute and narrowly construed a resolution of the House of Representatives "since Congress put no gloss upon it at the time of its passage." (*Id.* at 44, 45.) But neither the *Rumely* case nor any other decision of which counsel is aware has held that the doctrine of judicial restraint which dictates narrow construction to avoid unconstitutionality has ever been applied in a case where the unconstitutionality appeared from the declared Congressional purpose. The Court of Appeals was clearly correct in its determination that a statute enacted where the "purpose is to punish", see *United States v. Constantine*, 296 U. S. 287, 294 (1935), does not fall within the bounds of Congressional power.

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the Government implies that *Lassiter v. Northhampton County Board of Elections*, 360 U. S. 45, 53 (1959) is a case involving inquiry into legislative "purpose", while in fact the word "purpose" is not at all used in the case in such context.

## POINT II

The statute is unconstitutional as applied to the facts of this case because the conduct which it seeks to punish is a peaceful act of symbolic speech designedly conducted in an effective but constitutionally permissible manner under circumstances which fall well within the limits of the clear and present danger test, and which, in the application of the balancing test, compel a determination that the free speech consideration outweighs all countervailing considerations.

### A. *Symbolic speech is protected by the First Amendment.*

In order to reach its decision that the amendment was an unconstitutional attempt "to suppress expressions of dissent" the Court of Appeals succinctly stated it as "beyond doubt that symbolic action may be protected speech" (R. 63). The Government's brief makes an extensive effort to overturn this holding of unconstitutionality by means of an assault on the symbolic speech doctrine. It is not a head-on attack, but rather an attempt to minimize, weaken and circumscribe symbolic speech to such an extent that the doctrine will be inapplicable in this case. A review of the development of the judicial recognition of symbolic speech is therefore appropriate.

In defining the scope of the First Amendment, and ascertaining if any proscribed activity is within its coverage, it is clear that "abstract discussion is not the only species of communication which the Constitution protects;" *National Association for the Advancement of Colored People v. Button*, 371 U. S. 415, 429 (1963). As this Court has "repeatedly stated", the Constitutional guar-



antees of freedom of speech, freedom of assembly, and freedom of petition "are not confined to verbal expression. They embrace appropriate types of action. \* \* \* " *Brown v. Louisiana*, 383 U. S. 131, 141, 142 (1966). Chief Judge Sobeloff has written, summarizing the applicable decisions of this Court: "The First Amendment affords protection not merely to the voicing of abstract opinions upon public issues. It also protects implementing conduct which is in the nature of advocacy." *National Labor Relations Board v. International Longshoremen's Association*, 332 F. 2d 992 (4th Cir. 1964).<sup>9</sup>

Respondent urges that his symbolic act of publicly burning a Selective Service certificate as part of a demonstration against the war and against the draft was no more than an "appropriate type of action" embraced within the constitutional guarantee. It was "implementing conduct \* \* \* in the nature of advocacy." A series of decisions of this Court have established the doctrine that symbolic speech is such an "appropriate type of action" as is embraced within the First Amendment.

The author of the concept "symbolic speech" was Mr. Justice Jackson. The occasion for its authorship was the decision of the Supreme Court holding that a compulsory

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<sup>9</sup> Cf. Mr. Justice Brennan's Alexander Meiklejohn Lecture, delivered at Brown University on April 14, 1965:

"Many forms of expression have presented questions under the First Amendment. These questions have been raised in cases involving sit-ins and other forms of racial demonstrations, the picket line, the motion picture, the lawsuit when employed as political expression to seek legal redress for violation of civil rights \* \* \* and many others."

Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment", 79 *Harv. L. Rev.* 1, 4 (1965) (footnotes omitted).

flag salute was an unconstitutional violation of the First Amendment rights of Jehovah's Witnesses school children. Writing the opinion of the Court, in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 633 (1943), Mr. Justice Jackson recalled the Court's 1931 decision holding unconstitutional California's anti-radical "red flag" law:

"Over a decade ago Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guarantees of the Constitution. *Stromberg v. California*, 283 U. S. 359. Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to *communicate by word and sign* his acceptance of the political ideas it thus bespeaks." (Emphasis added.)<sup>10</sup>

Elsewhere in the opinion, Mr. Justice Jackson had this to say about expression via symbols:

"There is no doubt that \* \* \* the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution or personality, is a short cut from mind to

<sup>10</sup> Although there is no express articulation in the opinion of the Court, the dissenting opinion recognized that the court had decided that "the mere display of a flag as the emblem of a purpose, whatever its sort, is speech within the meaning of the constitutional protection of speech and press \* \* \*." *Id.* at 376. Cf. Chafee, *Free Speech in the United States* 336 (1941): "As Mr. Justice Butler was quick to observe, a flag is not speech. It does not talk." New York's "red flag" law was held unconstitutional on the express authority of *Stromberg v. California*, in *People v. Altman*, 241 App. Div. 858 (1st Dept. 1934).

mind. . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn." *Id.* at 632-633.

Although not articulated in terms of "symbolic speech" until Mr. Justice Jackson wrote his memorable *Barnette* opinion, *supra*, the precedent of the "red flag" case assisted the Court in determining that peaceful picketing is protected by the First Amendment. On the same day that it decided *Thornhill v. Alabama*, 310 U. S. 88 (1940), the Court also decided *Carlson v. California*, 310 U. S. 106 (1940). Holding a municipal anti-picketing ordinance unconstitutional, Mr. Justice Murphy wrote for the Court:

"The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information of matters of public concern. *Stromberg v. California*, 283 U. S. 359." *Id.* at 112-113.

In a later case, *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 275, 293 (1941), Mr. Justice Frankfurter wrote, for the Court: "Peaceful picketing is the workingman's means of communication."<sup>11</sup>

The concept of communication via symbols or other non-verbal acts has likewise played a role in the formulation of constitutional doctrine to cope with civil rights demon-

<sup>11</sup> Prof. Kalven has observed that the sit-in demonstration is the "poor man's printing press." Kalven, *The Negro and the First Amendment*, 133 (1965). Cf. *Martin v. Struthers*, 319 U. S. 141, 146 (1943): "Door to door distribution of circulars is essential to the poorly financed causes of little people."

strations. A most carefully articulated statement is that of Mr. Justice Harlan, concurring in *Garner v. Louisiana*, 368 U. S. 157, 185 (1961): "We would surely have to be blind not to recognize that petitioners were sitting at these counters, where they knew they would not be served, in order to demonstrate that their race was being segregated in dining facilities in this part of the country." *Id.* at 201. Mr. Justice Harlan developed this line of thought by express reference to *Stromberg v. California*, *supra*, and to *West Virginia Board of Education v. Barnette*, *supra*:

"Such a demonstration, in the circumstances of these two cases, is as much a part of the 'free trade in ideas' *Abrams v. U. S.*, 250 U. S. 616, 630 (Holmes, J. dissenting), as is verbal expression, more commonly thought of as 'speech'. It, like speech, appeals to good sense and to 'the power of reason as applied through public discussion' *Whitney v. California*, 274 U. S. 357, 375 (Brandeis, J., concurring), just as much as, if not more than, a public oration delivered from a soapbox at a street corner. This court has never limited the right to speak, a protected 'liberty' under the Fourteenth Amendment, *Gitlow v. N. Y.*, 268 U. S. 652, 666, to mere verbal expression. *Stromberg v. California*, 283 U. S. 359; *Thornhill v. Alabama*, 310 U. S. 88; *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 633-4. See also *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 460. If the act of displaying a red flag as a symbol of opposition to organized government is a liberty encompassed within free speech as protected by the Fourteenth Amendment, *Stromberg v. California*, *supra*, the act of sitting at a private lunch counter with the consent of the owner, as a demonstration of

opposition to enforced segregation, is surely within the same range of protections. This is not to say, of course, that the Fourteenth Amendment reaches to demonstrations conducted on private property over the objection of the owner \* \* \* just as it would surely not encompass verbal expression in a private home if the owner has not consented." *Id.* at 201-202.<sup>12</sup>

The civil rights demonstration as a form of communication received further consideration by this Court in *Brown v. Louisiana, supra*. By a vote of 5-4, the Court reversed breach of the peace convictions of five Negro members of CORE who, in a deliberate effort to desegregate a public library in Clinton, Louisiana, staged a peaceful, silent, sit-in and stand-up demonstration. The "prevailing opinion"<sup>13</sup> of Mr. Justice Fortas describes what happened:

"Petitioners, five adult Negro men, remained in the library room for a total of ten or fifteen minutes. The first few moments were occupied by a ritualistic request for service and a response. We may assume that

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<sup>12</sup> This portion of Mr. Justice Harlan's opinion is quoted at length, and apparently with approval, by Mr. Justice Brennan, concurring in *Brown v. Louisiana, supra*, at 143, 146, fn. 5. Prof. Kalven writes: "This passage \* \* \* quite deliberately associates the sit-in as a form of communication with the passionate free speech rhetorics of Holmes in *Abrams* and Brandeis in *Whitney*. Indeed, the identification of the sit-in with a First Amendment freedom could hardly be more vigorous \* \* \*." Kalven, *op. cit.* at 131. Cf. "The Supreme Court: 1961 Term," 76 *Harv. L. Rev.* 54, 124, n. 167 (1962).

<sup>13</sup> The phrase is that of Mr. Justice Black who wrote the dissenting opinion. *Id.* at 151, 152, fn. 1. Mr. Justice Fortas' opinion was joined in by the Chief Justice and Mr. Justice Douglas. Mr. Justice Brennan and Mr. Justice White wrote separate concurrences.



the response constituted service, and we need not consider whether it was merely a gambit in the ritual. This ceremony being out of the way, the Negroes proceeded to the business in hand. They sat and stood in the room, quietly, as monuments of protest against the segregation of the library. They were arrested and charged and convicted of breach of the peace under a specific statute." *Id.* at 139.

The conclusion was that the Louisiana breach of the peace statute "cannot constitutionally be applied to punish petitioners' actions in the circumstances of this case", *id.* at 142, since they were "engaged in lawful, constitutionally protected exercise of their fundamental rights." *Id.* at 143.<sup>14</sup>

The meaning of all of the decisions which have just been discussed is that symbolic speech is nevertheless speech, and commands the protection of the First Amendment.

<sup>14</sup> The Government's brief infers (p. 16) that only Mr. Justice Harlan reached the constitutional question in the sit-in case, *Garner v. Louisiana*, *supra*. In *Brown v. Louisiana*, *supra*, it is clear that at least four Justices, and perhaps five, reached this constitutional question. See concurring opinions of Mr. Justice Brennan and Mr. Justice White. Furthermore, whatever may be the case with respect to sit-in demonstrations, a clear majority of the court has agreed that street civil rights demonstrations are protected by the First Amendment, notwithstanding the fact that they include the communication of ideas "by conduct such as patrolling, marching and picketing." *Cox v. Louisiana*, 379 U. S. 536, 555 (1965). (Emphasis added.) The Court pointed out that the First Amendment did not afford such conduct the "same kind of freedom" as "pure speech". But it explicitly recognized that in both instances, pure speech and conduct, ideas were communicated, and the First Amendment applied, albeit to differing extents.

It is respondent's contention that a constitutionally proper definition of the scope of the First Amendment<sup>15</sup> is one which is broad enough to include all modes of symbolic speech, or communication of ideas by conduct, *Cox v. Louisiana, supra*, at 555. The test is not the form, or method, or mode of expression, but rather whether all of the circumstances present a clear and present danger, or require that a balance be struck in favor of restricting the expression, depending on which of these tests is to be invoked.<sup>16</sup>

In the 1941 decision of *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., supra*, the Court reaffirmed but distinguished its then recent decisions in *Thornhill v. Alabama, supra*, and *Carlson v. California, supra*, and held that there was no free speech protection for acts of violence committed on the picket line. The Court's opinion, written by Mr. Justice Frankfurter, includes the following rationale:

"It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guaranty of free speech lay faith in the power of an appeal to reason by *all the peaceful means for gaining access to the mind*. It was in order to avert force and explosions due to restrictions upon *rational modes* of communications that the guaranty of free speech

<sup>15</sup> The free speech clause of the First Amendment is not the only constitutional provision concerned with speech which has been given a broad definition. Art. I, Section 6, provides that "for any Speech or Debate in either House" members of Congress "shall not be questioned in any other Place." This Court has held: "It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible \* \* \* to things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson*, 103 U. S. 168, 204 (1880); *U. S. v. Johnson*, 383 U. S. 169, 179 (1966).

<sup>16</sup> See discussion of both tests, *infra*, at pp. 43-54.

was given so generous a scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. *Such utterance* was not meant to be sheltered by the Constitution." *Id.* at 293. (Emphasis added.)

The First Amendment does not protect, according to *Meadowmoor*, "utterance in a context of violence." But, *absent the violence*, it does protect "all the peaceful means for gaining access to the mind", all "*rational modes of communication*" (emphasis added). We discuss below the applicability of the clear and present danger test or the *ad hoc* balancing test to the statute and the facts of this case. But the inevitable conclusion which emerges from the argument thus far, is that there is nothing *a priori* illicit in an attempt to gain access to the mind by means of the symbolic act of burning a piece of paper as a portion of a public demonstration directed at criticism of the Governmental action which the piece of paper symbolizes. It is surely a "rational mode of communication".

The Government's brief launches several flanking attacks on symbolic speech and its application to this case. First it argues that since the statute has only "an ancillary and minimal impact on the expression of dissent" (p. 12), draft-card burning should not have the same degree of constitutional protection as other forms of communication. However, in the *Stromberg* red flag case and the *Barnette* flag salute case<sup>17</sup>, as in the instant case, the statute's impact on expression of dissent is not subject to such facile quantitative analysis.<sup>18</sup>

<sup>17</sup> The two classical symbolic speech cases relied on by the Court below (R. 63).

<sup>18</sup> The Government's brief states, on page 14, that "Simply to call conduct 'speech' is not, however, enough to clothe it with con-

The government contends that symbolic speech is entitled to less constitutional protection than any other speech. But this Court did not hold in the red flag and flag salute cases that symbolic speech is entitled to a lesser degree of protection than any other speech. See *Stromberg v. California*, *supra*, and *West Virginia Board of Education v. Barnette*, *supra*.<sup>19</sup>

Having attempted to limit the area of protectable speech, and then in turn to limit the protectability of symbolic speech, the Government finally acknowledges that there is such a thing as symbolic speech but attempts to water it down to where it would be meaningless in this case. On pages 15 through 19 various rationales, some self-contradictory, for the symbolic speech doctrine are articulated. However, many of the suggested distinctions merely underscore how comfortably respondent's verbal conduct falls within the doctrines of symbolic speech.<sup>20</sup> It is stated, for example, on page 16, that each of the cases decided by the Court "represents an example of conduct which is the

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stitutional protection." Of course, fixing a name to an act is obviously insufficient to convert the act into that which it is called. The questions are rather: Is it a rational mode of communication? See *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, *supra*. Is it a "peaceful means for gaining access to the mind"? (*Ibid.*) Does it otherwise meet the proper constitutional test?

<sup>19</sup> The Court below correctly held that the symbolic speech in this case is entitled to no less protection than in the classical symbolic speech cases (R. 63).

<sup>20</sup> *Stromberg v. California*, *supra*, is explained as being the "equivalent of speech" because the peaceable display of a red flag "conveys, in generally understood terms, opposition to an existing government. . . ." (p. 16). Can it be doubted that the peaceable ceremony of draft-card burning "conveys, in generally understood terms, opposition to an existing government" policy, i.e., the Vietnam war?



equivalent of speech or significantly adds meaning beyond that conveyed by oral expression." Surely Mr. O'Brien's public ritual burning of his draft card on the courthouse steps was the "equivalent of" a speech which he might have made denouncing the draft, and even more surely it had "meaning beyond that conveyed" by any oral expression.<sup>21</sup>

The final effort at rationale-creating is the statement that symbolic speech protection is available only "where shown to be necessary to ensure effective communication of the ideas sought to be expressed." No authority is cited in support of this extravagant statement which stands all traditional doctrines of freedom of expression on their head. The Government would have it that free speech under the Constitution is not always available, but only where "shown to be necessary . . ." for some purpose. Such limitations as are imposed on free speech are based on other constitutional criteria, but not on whether or not any court deems that a particular mode of speech is "necessary".<sup>22</sup>

<sup>21</sup> Another government rationale is that symbolic speech covers an act which is a "traditionally recognized substitute" for a verbal statement (p. 15). Traditions, of course, develop at varying rates of speed. Is the Government suggesting that draft card burning can only be held to come within the symbolic speech doctrine after a sufficient number of years have passed so that a "tradition" can be said to have developed recognizing it as a substitute for a verbal statement? If the extent of public recognition is the criterion, surely the legislative history which led to the amendment establishes this beyond doubt. And if one must look to the historical tradition of the symbolic and peaceful burning of a document or a thing, one can recall from American history the popular Nineteenth Century political practice of burning dummies in effigy, and the practice prior to the Civil War of burning Fugitive Slave warrants.

<sup>22</sup> This is not the same argument as the constitutional right to make one's speech as effective as possible, which is discussed in the next section. The citizen has this right and may exercise it within constitutional limits. But government does not have the power,



**B. *There is a constitutional right to make one's speech as effective as possible, subject to the proper constitutional standard.***

With acerbic allusions to the dumping of garbage in front of City Hall (p. 15), and to demanding unauthorized entry into the White House (p. 18, fn. 10), and even to political assassination (p. 14, fn. 5), the Government's brief implies that respondent is insisting on a constitutional right to do anything which is in the nature of communication of protest. Respondent makes no such argument. We agree with the Court below that the First Amendment does not give anyone "carte blanche" (R. 64). There are obviously limits.

In respondent's view, the constitutional limits are measured by the clear and present danger test; although we urge that the same result will be reached via application of the *ad hoc* balancing test. Both tests are discussed in the next section of this brief.

What we do urge, however, is that *within the limits established by any applicable constitutional test*, the First Amendment does, in fact, include the right to make the most dramatic and compelling speech possible.<sup>23</sup> To put it another way, the First Amendment does not circumscribe its protection to only the most boring and least effective

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under the Constitution, to determine that any particular mode of speech is not "necessary to ensure effective communication. . . ." If such were the case the State of California would have had the right to tell Miss Stromberg that it was not "necessary" for her to carry a red flag in order to project her radical ideas. See *Stromberg v. California*, *supra*.

<sup>23</sup> The Government concedes that draft card burning may heighten the dramatic effectiveness of the protest (p. 18), but makes two arguments in opposition: (1) that "one does not have a constitutional right to perform acts otherwise subject to restraint simply because they are dramatic"; and (2) that there are other ways of vigorously expressing dissent. The first argument is an example

speech possible. " \* \* \* [O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U. S. 147, 163 (1939).

Subject always to reasonable limitations imposed by the necessity of traffic controls and the application of the proper constitutional test, the speaker has the right to choose the place where he can be most effective, *Martin v. Struthers*, 319 U. S. 141, 150 (1943), *Schneider v. State*, *supra*; the time when he can be most effective, *Mills v. State of Alabama*, 384 U. S. 214 (1966); and the manner in which he can be most effective, *Saia v. New York*, 334 U. S. 558 (1948), *Kovacs v. Cooper*, 336 U. S. 77, 87 (1949); see *Williams v. Wallace*, 240 F. Supp. 100 (M. D. Ala. 1965) (mandatory injunction authorizing 45 mile protest march on public highway from Selma to Montgomery, Alabama, by civil rights demonstrators); *United Electrical, Radio & Machine Workers of America v. Baldwin*, 67 F. Supp. 235, 242 (D. Conn. 1946) (allowing picketing at home of Governor, Judge Smith held: "To ban such activity because it is unpleasant to have such publicity at home is to admit the effectiveness of this kind of free expression \* \* \*").<sup>24</sup>

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of bootstraps reasoning. The dramatic element neither adds to nor detracts from the existing constitutional right. The question is whether the acts are properly subject to restraint, i.e., the proper constitutional test, and its application. The second argument is rebutted by the cases cited in the text. Cf. *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 425 Pa. 382, 227 A. 2d 874, cert. granted 389 U. S. 911 (1967) where this Court will have before it the question of whether peaceful picketing in a privately-owned shopping center can be enjoined because, among other reasons, picketers can remove their picket line to the distant edges of the premises.

<sup>24</sup> The issue of effectiveness arises in two contexts. In one, the speaker, because of limited resources, if he desires to be effective,

The obvious rationale for the protection of the most effective means of expression has been well stated by Mr. Justice Black:

"I cannot accept \* \* \* [the] view that the abridgment of speech and press here does not violate the First Amendment because other communications are left open. This reason for abridgment strikes me as being on a par with holding that governmental suspension of a newspaper in a city would not violate the First Amendment because there continues to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by full swoop." *N. L. R. B. v. Fruit & Vegetable Packers*, 337 U. S. 58, 79-80 (1964) (concurring opinion).

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has no other choice but the mode of expression which is proscribed. Thus the concept of "the workingman's means of communication," and the "poor man's printing press". See footnote 3, *supra*, and accompanying text. In the other context, the speaker has several options available, but elects to utilize the mode of expression which he regards as most effective for his purposes. See *Mills v. Alabama*, *supra*; *N. L. R. B. v. Fruit & Vegetable Packers*, *infra*; *U. E. R. M. W. A. v. Baldwin*, *supra*.

**C. The proper constitutional standard is the clear and present danger test, and application of such test compels a determination of unconstitutionality. However, even if this Court prefers to apply the balancing test, the balance of interests is strongly weighted in favor of freedom of expression, and likewise requires a holding of unconstitutionality.<sup>25</sup>**

**D. The clear and present danger test.**

Respondent urges that the constitutional validity of the statute, and his conviction, must be evaluated in accordance with the requirements of the clear and present danger test:<sup>26</sup>

"The question in every case is whether the words used are used in such circumstances and are of such a nature to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."<sup>27</sup>

<sup>25</sup> The court below does not appear to have applied either test. The Second Circuit, in *United States v. Miller*, 367 F. 2d 72 (1966), cert. den. 386 U. S. 911 (1967), specifically rejected the clear and present danger test and applied the balancing test.

<sup>26</sup> The Government notes the "stringent requirements of the clear and present danger test" (Brief, p. 14) and then seems to contend that it may be applied only to what the Government regards as bona fide symbolic speech (p. 15). Cf. *United States v. Miller*, *supra*, 367 F. 2d at 80, which seems to hold a much broader area of speech outside the reach of the clear and present danger test. The Government espouses the balancing test (p. 21), because of its view that draft card burning is not symbolic speech. Thus, the Government appears to concede that if it is symbolic speech, then the clear and present danger test should be applied, in which case it is inferred that respondent may prevail. In any event, the Government makes no effort to analyze the clear and present danger test as applied to this case.

<sup>27</sup> This is the classic expression by Mr. Justice Holmes in *Schenck v. U. S.*, 249 U. S. 47, 52 (1919). See *Whitney v. California*, 274 U. S. 357 (1927). See also, *Wood v. Georgia*, 370 U. S. 375 (1962);

Applying this test in *Herndon v. Lowry*, 301 U. S. 242 (1937), this Court reversed the conviction of a Communist Party organizer who was admittedly advocating among Georgia Negroes the establishment of a Negro Black Belt separate Republic. Mr. Justice Roberts wrote for the Court:

"The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterance of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered." *Id.* at 258.

What is the substantive evil which Congress sought to prevent by enactment of the statute under review? There is certainly no apprehension of danger to organized government. We argue elsewhere in this brief that the statute is unconstitutional on its face, because its legislative history discloses a blatantly unconstitutional purpose—the deliberate suppression of a specific form of dissent. See Point I, *supra*.

But assuming bona fide legislative purpose, the most that can be said for the "substantive evil" is that Selective Service registrants who destroy or mutilate their certificates will not have them available for inspection, for either their own benefit or the government's benefit. The court below did not articulate any legislative purpose which

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*Thomas v. Collins*, 323 U. S. 516 (1945); *Taylor v. Mississippi*, 319 U. S. 583 (1943); *Bridges v. California*, 314 U. S. 252 (1941); *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1941); *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *Sellers v. Johnson*, 163 F. 2d 877 (8th Cir. 1947), cert. den. 332 U. S. 851 (1948).



would provide justification for the statute.<sup>28</sup> The Government's brief, however, attempts to set forth a number of purposes (pp. 22 to 24).

First, it is asserted that there is a constitutional power to conscript and classify manpower.<sup>29</sup> But this hardly implies a constitutional sanction for every piece of related legislation.

A number of instances are then set forth where a draft card may serve an identification or notice-giving purpose (p. 23) but it is submitted that these are almost exclusively for the registrant's benefit, and provide at best only some remote government utility.<sup>30</sup>

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<sup>28</sup> The Court considered and rejected one argument which was not made below, "the pecuniary loss to the government by the destruction of a card. . . ." (R. 62, fn. 5). The Government apparently attempts to rebut this holding by referring to a single sentence in the House Report, p. 2a, *infra*, which speculated as to whether or not a certificate might be deemed "government property." (Brief, p. 22.)

<sup>29</sup> The last occasion where this Court ruled on the constitutionality of conscription was *Arver v. U. S. (The Selective Draft Law Cases)*, 245 U. S. 366 (1918), which upheld World War I conscription legislation enacted while the nation was at war pursuant to Congressional declaration.

<sup>30</sup> It is interesting that the most dramatic purposes suggested by the Government in its argument below, and apparently adopted by the Second Circuit in *United States v. Miller, supra*, 367 F. 2d at 80-81, i.e., the contemplated usefulness of the card in the event of disaster or emergency mobilization, have apparently been abandoned in this Court. The Government's brief states that it is "common knowledge" that a draft card serves a variety of purposes. The most common knowledge of the purpose it serves is that it provides proof that a young man has reached the age of 18 years, in a state where 18-year-olds are allowed to purchase alcoholic beverages. But clearly, this, like the others, is a service for the registrant of which the registrant can presumably waive the benefit.

It is noteworthy that in all of the trial court and appellate court litigation involving draft card burning cases<sup>31</sup> there has never been presented a single statement of justification for the statute by the Selective Service System, the Department of Defense, or any agency or official of the Executive branch. This Court can take note of the fact that the present Selective Service System has been in existence since 1940. It has amassed a vast accumulation of annual reports, policy statements, local board memoranda, speeches by the distinguished Director, and undoubtedly considerable other material. Yet not one word can be produced by the Government in support of the argument that the statute, or indeed, the possession regulation, serves some useful purpose.<sup>32</sup>

/ In sum, respondent submits that if the "stringent requirements of the clear and present danger test" (Govt's

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<sup>31</sup> Several of the counsel in this case are also counsel in other draft card burning cases.

<sup>32</sup> The ingenuity of Government counsel in suggesting purposes which were never contemplated or suggested either by the Selective Service System or by Congress, has been commented upon by Professor Lawrence Velvel:

"Of course, the Court has said in the past that the reasons which provide the basis for upholding the constitutionality of a statute need not be the reasons which prompted its passage. Indeed, where economic matters are involved, the Court has indicated that a legislative judgment must be upheld if it is possible to conjure up any reasonable state of facts which might support the judgment. But surely less heed should be paid to this sort of conjurings in the vital area of first amendment freedoms than in other less vital areas, such as economic matters. There should, after all, be a right to demand more, before first amendment rights are curtailed, than that government lawyers have dreamed up some hypothetical state of facts which might support such an inroad on freedom. There should at least be a right to demand that the requisite state of facts will be a likely one. It would seem that, unless hypothetical conjurings are viewed with suspicion in the first

brief, p. 14) are to be applied, none of the justifications advanced, real or fanciful, can save the statute.<sup>33</sup>

### 1) The *ad hoc* balancing test.

While respondent urges the application of the clear and present danger test, it is recognized that in the light of certain First Amendment decisions of this Court, the *ad hoc* balancing test might also be considered.<sup>34</sup> The test states that in each individual case the Court must balance the interest in freedom of expression against "the magnitude of the public interests which the \* \* \* [statute is] designed to protect" and "the pertinence which \* \* \* [the statute bears] to the protection of those interests." *Communist Party v. Subversive Activities Control Board*, 367 U. S. 1, 93 (1961) (per Mr. Justice Frankfurter). See also *Cox v. Louisiana*, *supra*; *Barenblatt v. U. S.*, 360 U. S. 109 (1959); *NAACP v. Alabama*, 357 U. S. 449 (1958); *American Communications Association v. Douds*, 339 U. S. 382 (1950).

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amendment area, there is a great danger that basic freedoms will be lost to the imaginations of government attorneys." (Footnotes omitted.) 16 Kansas L. Rev. 149, 162-163.

<sup>33</sup> On pages 24 through 27 of the Government's brief, argument is presented seeking to rebut the position taken by the Court below, that given the existence of the possession regulation, the burning statute serves no rational purpose. This argument presumes the validity of the possession requirement, which respondent sharply contests. See Point V, *infra*. However, assuming *arguendo* the constitutionality of the possession regulation, the Court of Appeals was indeed correct in its trenchant observation that "If there is a big hole in the fence for the big cat need there be a small hole for the small one?" See *Jarecki v. G. D. Searle & Co.*, 367 U. S. 303, 307 (1961) (R. 62-63).

<sup>34</sup> For an analysis of both the clear and present danger test and the balancing test, see Emerson, "Toward a General Theory of the First Amendment", 72 *Yale L. J.* 877, 910-912, 912-914 (1963). For a well-reasoned critique of the balancing test see Frantz, "The First Amendment in the Balance", 71 *Yale L. J.* 1424 (1962).

What is the magnitude of the public interests which the statute is designed to protect? And how pertinent is the statute to the protection of those interests? For the purposes of this argument, respondent assumes that there is substantial magnitude to the public interest sought to be protected, i.e., the proper functioning of the Selective Service System. But we have already shown that this statute has no relation whatsoever to the achievement of such purpose.<sup>35</sup>

On the other side of the balance is the restriction of freedom of expression. Even if non-verbal communication is entitled to less weight on the free speech side of the balance than "pure" speech, *Cox v. Louisiana, supra*, it must nevertheless be balanced. Respondent urges that the application of the balancing test compels a conclusion that our society loses more in free speech than it gains in Selective Service administration by the application of the statute to respondent.

It is clear that Congress could pass no law which by its express terms provided, "Any speech which criticizes, attacks, insults or mocks the government's efforts in Vietnam shall be punished, etc. . . ." Nor could Congress provide that "Any speech where the speaker announces that he will refuse to serve in the armed forces, or otherwise expresses defiance of the authority of the Federal government shall be punished, etc. . . ."

If a Selective Service registrant, addressing a public meeting criticizing the government's foreign policy, held aloft his Registration Certificate, and said words to the effect that "I detest and execrate this piece of paper and

<sup>35</sup> See discussion of purposes at footnotes 27-32 and accompanying text, *supra*.

everything for which it stands", surely the attempted punishment of such verbal action would be beyond Constitutional limits. It is submitted that insofar as Congressional power under the First Amendment is concerned, the symbolic expression of destroying or mutilating the piece of paper in such a context creates no constitutionally significant difference.

A statute which expressly prohibits the right to express political dissent would admittedly violate the First Amendment. It would be palpable incongruity to uphold a statute which achieves the same result because accomplished under another guise. "It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost & Trucking Co. v. Railroad Comm.*, 271 U. S. 583, 594 (1926); *Gomillion v. Lightfoot*, 364 U. S. 339, 345 (1960).

### POINT III

Since the statute does not serve any rational legislative purpose, it is an unconstitutional deprivation of individual liberty without due process of law contrary to the guaranty of substantive due process contained in the Fifth Amendment, both on its face and as applied to respondent.

It has long been recognized that there exists a constitutional right of substantive due process which protects individual liberty from improper Federal action under the Fifth Amendment, and corresponding state action under the Fourteenth. "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is



arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Meyer v. Nebraska*, 262 U. S. 390, 399-400 (1923). Accord: *Pierce v. Society of Sisters*, 268 U. S. 510, 535 (1925); see *Truax v. Raich*, 239 U. S. 33, 43 (1915).

In *Meyer*, this Court held it was a deprivation of the liberty of teacher and student to ban the teaching of the German language in the Nebraska public schools. *Pierce* held unconstitutional, as a deprivation of the liberty of parents to educate their children, an Oregon statute which compelled attendance at public schools, to the exclusion of private religious schools. Both *Meyer* and *Pierce* noted the absence of any emergency requiring such extraordinary measures. *Meyer v. Nebraska*, *supra* at 403; *Pierce v. Society of Sisters*, *supra* at 534. *Truax* held unconstitutional an Arizona statute which sought to restrict the employment of aliens. In each case there was a deprivation of individual liberty in violation of the principle of substantive due process.

There was a period in our nation's judicial history when courts invoked this doctrine to set aside welfare legislation, and measures seeking to regulate industry in the public interest. See *Lochner v. New York*, 198 U. S. 45 (1905). But, as Mr. Justice Douglas observed, writing for the Court in *Williamson v. Lee Optical Co.*, 348 U. S. 483, 488 (1955):

"The day is gone when this Court uses the due process clause of the 14th Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out-of-harmony with a particular school of thought."

In *Griswold v. Connecticut*, 381 U. S. 479, 482 (1965), the Court again speaking through Mr. Justice Douglas, developed the argument somewhat further in considering the constitutionality of Connecticut's anti-contraceptive law:

"We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."

The holding of the Court was that the statute violated a constitutional right of marital privacy contained within the penumbra of several specific guarantees of the Bill of Rights, including the Fifth Amendment. And it specifically reaffirmed "the principle of the *Pierce* and the *Meyer* cases." *Id.* at 483.

Respondent submits that this passage in *Griswold* means that there is a constitutionally significant distinction between the application of the due process clause to economic, business and social regulation, and its application to Federal and State laws which infringe on individual liberty.<sup>38</sup> The individual "liberty" of which a person may be deprived includes "the full range of conduct which the individual is free to pursue." *Bolling v. Sharpe*, 347 U. S. 497, 499 (1954). This includes not only the various rights comprehended in the *Meyer*, *Pierce* and *Truax* cases, but also the right of privacy, *Griswold v. Connecticut*, *supra*; the

<sup>38</sup> Cf. Henkin, " 'Selective Incorporation' in the Fourteenth Amendment", 73 *Yale L. J.* 74, 85 (1963): "Substantive due process, as is well known, found its origin and its wild and questionable growth in regard to economic regulation; only comparatively recently has it begun to protect political and civil liberties."

right to travel, *Aptheker v. Secretary of State*, 378 U. S. 500, 505 (1964), *Kent v. Dulles*, 357 U. S. 116 (1958), and "In the light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress \* \* \*" *Galvan v. Press*, 347 U. S. 522, 530 (1954), undoubtedly other rights as well.<sup>37</sup>

Viewed from another angle, the ordinary presumption of constitutionality of a legislative act does not exist where the legislation infringes on individual liberty or any other preferred constitutional right enshrined in the Bill of Rights. *U. S. v. Carolene Products*, 304 U. S. 144, 152, fn. 4 (1938); *Schneider v. State*, 308 U. S. 147, 161 (1939); *Thornhill v. Alabama*, 310 U. S. 88 (1940) ("Mere legislative preference for one rather than another means for combating substantial evils, therefore, may well prove an inadequate foundation on which to rest regulations which are arrived at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Id.* at 95-96); *A.F. of L. v. Swing*, 312 U. S. 321, 325 (1941); *Murdock v. Pennsylvania*, 319 U. S. 105, 115 (1943); *Thomas v. Collins*, 323 U. S. 516 (1945) ("\* \* \* the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment \* \* \* that priority gives these liberties a sanctity and a sanction not permitting dubious intrusions." *Id.* at 529-530); *Marsh v. Alabama*, 326 U. S.

<sup>37</sup> Cf. Mr. Justice Goldberg, concurring in *Griswold v. Connecticut*, *supra*, at 492: "As any student of this Court's opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States. [Citing cases.]"

501, 509 (1946); *United States v. C.I.O.*, 335 U. S. 106 (1948) ("The presumption rather is against the legislative intrusion into these domains." *Id.* at 140; concurring opinion, Rutledge, J.).

The Government argues that the enactment of the statute is a reasonable exercise of the powers of Congress to raise armies. But substantive due process imposes limitations "upon all powers of Congress, even the war power" *Galvan v. Press, supra*.<sup>38</sup> The test continues to be whether the legislative action is "arbitrary or without reasonable relation" to some competent legislative purpose. *Meyer v. Nebraska, supra*.

That the enactment of the statute was *ab initio* arbitrary and for an improper legislative purpose, is evident from a review of the legislative history, *supra*. That it bears no legitimate or reasonable relationship to the war power is demonstrated by the prior discussion of legislative purposes advanced by the Government, the opinion below,<sup>39</sup> and other public facts of which this Court can take notice.

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<sup>38</sup> Although war powers are broad, legislation enacted under such powers has been sustained, however, in cases where the courts have found a persuasive, rational relationship between the enactment and the economic and military conditions of war preparedness. See, e.g., *Arver v. United States*, 245 U. S. 366 (1918) (enactment of World War I conscription legislation while nation at war pursuant to Congressional declaration); *Yakus v. United States*, 321 U. S. 414 (1944) (authority to prescribe commodity prices); *Bowles v. Willingham*, 321 U. S. 503 (1944) (authority to prescribe maximum rents); *Lichter v. United States*, 334 U. S. 742 (1948) (renegotiation of profits from war contracts); *Woods v. Miller*, 333 U. S. 138 (1948) (rent control). In all of these cases, the legislation was essential either to increase the size of our armed forces or to make our economic resources available for the war effort.

<sup>39</sup> The Court of Appeals noted "the absence of any proper [purpose]" (R. 62, fn. 6).



The destruction of a Selective Service certificate by its bearer, in no way affects the economic or military capabilities of the United States. It is common knowledge that the Selective Service System, through the local boards, and various City, State and National Headquarters, maintains extensive records of each male American citizen. Perhaps the destruction of *these* records might endanger national security. To punish an individual citizen who destroys *his own* certificate as a form of public protest is to strike at conduct which is entirely too remote from the waging of and preparation for war.

The legislation was not sought by the Selective Service System. There were no hearings, and there is no indication in the legislative history that the views of the Selective Service System were solicited, or even of any concern to those who pushed through the amendment. Indeed, such evidence as there is of the views of the Selective Service System is that the legislation was completely unnecessary for the operation of the System. See *Philadelphia Evening Bulletin*, October 29, 1965, p. 5, where Lt. Gen. Lewis B. Hershey, Director of the System, is reported to have stated in a speech that the law was not necessary.

Nevertheless, the Government urges that the legislative determination should not be pronounced unconstitutional because it has some relationship to a proper purpose. It is interesting to note that very similar language was used by the Supreme Judicial Court of the Commonwealth of Massachusetts in a pre-*Stromberg* decision which upheld the constitutionality of the Massachusetts red flag law.<sup>40</sup>

<sup>40</sup> *Commonwealth v. Karvonen*, 219 Mass. 30, 32-33 (1914):

"Its [the legislature's] determination in this regard cannot be pronounced by the courts contrary to the fundamental law, as being arbitrary or unreasonable, or as having clearly no relation to the ends for which the police power may be exercised."



Respondent submits that this Court is not being asked to exercise legislative judgment. It is being asked to exercise the recognized judicial function of declaring a statute to be unconstitutional as beyond Congressional power.

#### POINT IV

The judgment of the Court of Appeals in holding respondent guilty of a violation of the regulation proscribing non-possession, for which he was not indicted, notwithstanding its holding that the burning statute was unconstitutional, is invalid.

**A. *The Court of Appeals incorrectly applied the lesser included offense theory, as the Government concedes in this Court.***

The Court of Appeals held that F. R. Crim. P. 31(c) provided the basis for a conviction for non-possession after it had held the "burning" statute unconstitutional. As the Government correctly concedes "The statutory crime of draft card destruction is not a 'greater offense' than the . . . offense of non-possession, since the punishment for the commission of either offense is identical. . . ." (Brief, p. 32).<sup>41</sup>

The parameters of the lesser offense doctrine have been delineated by this Court in *Sansone v. U. S.*, 380 U. S. 343, 349-350 (1965):

<sup>41</sup> That such a different degree of punishment is an indispensable element of the doctrine of lesser-included offense is clear from the very language of Rule 31(c) and the fact that no decision wherein the "lesser-included" crime did not in fact have a less severe penalty has been found by respondent's counsel. Cf. 27 Am. Jur. 105, 193, 194.

"The basic principles controlling whether or not a lesser-included offense charge should be given in a particular case have been settled by this Court. Rule 31 (c) of the Federal Rules of Criminal Procedure provides, in relevant part, that the 'defendant may be found guilty of an offense necessarily included in the offense charged.' Thus, '[i]n a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justifie[s] it . . . [is] entitled to an instruction which would permit a finding of guilt of the lesser offense.' *Berra v. United States, supra*, at 134. See *Stevenson v. United States*, 162 U. S. 313. In other words, the lesser offense must be included within but not, on the facts of the case, be completely encompassed by the greater. A lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense. *Berra v. United States, supra*; *Sparf v. United States, supra*, at 63-64."

Thus "a chargeable lesser offense must be such that the greater offense cannot be committed without also committing the lesser. See, e.g., *Larson v. United States*, 296 F. 2d 80 (10th Cir. 1961); *James v. United States*, 238 F. 2d 681, 16 Alaska 513 (9th Cir. 1956); *Giles v. United States*, 144 F. 2d 860, 10 Alaska 455 (9th Cir. 1944). This construction accords with the general common law rule. See 4 WHARTON CRIMINAL LAW AND PROCEDURE §1888, p. 754 (1957)." *Crosby v. United States*, 339 F. 2d 743 (D. C. Cir. 1964).

There is a grave question as to whether the Court of Appeals had jurisdiction to convict respondent under the non-possession regulation, notwithstanding lack of indictment, after it set aside the conviction under the burning statute. Compare *U. S. v. Ciongole*, 358 F. 2d 439 (3d Cir. 1966) cited below (R. 64), with *U. S. v. Martini*, 42 F. Supp. 502 (S. D. Ala. 1941).<sup>42</sup>

Assuming the court below did have jurisdiction, however, it is necessary to examine the indictment. It charges that at a given time and place, respondent "willfully and knowingly did mutilate, destroy, and change by burning a certificate issued by Local Board No. 18, Selective Service System, Framingham, Massachusetts, pursuant to and prescribed by the provisions of the Universal Military Training and Service Act, as amended, and the rules and

<sup>42</sup> In *Martini*, the Court held:

"Section 565 [Rule 31(c)] authorizing the verdict of guilty of a lesser offense contemplates that the verdict must be by the finder of fact to which the question of guilt is submitted. This means in this case the jury. Where the jury finds a defendant guilty of one offense it is not within the power of the court after setting aside the verdict to find the defendant guilty of a lesser offense. The statute is no doubt intended to cover offenses such as are included in the charge of murder, which embraces the lesser offenses of manslaughter—*Sparf and Hansen v. United States*, 156 U. S. 51, 63, 64, 15 S. Ct. 273, 39 L. Ed. 343, 347; *Stevenson v. United States*, 162 U. S. 313, 315, 16 S. Ct. 839, 40 L. Ed. 980, 981; *Ball v. United States*, 163 U. S. 662, 670, 16 S. Ct. 1192, 41 L. Ed. 300, 303; or of burglary and felonious breaking which includes larceny—*United States v. Dixon*, Fed. Cas. No. 14,968; *United States v. Read*, Fed. Cas. No. 16,126. If the defendants had been charged with a violation of Section 193 they would have had an opportunity to introduce evidence which was not pertinent to the charge under Section 502. There is testimony in the record which was irrelevant under Section 193 but as to which the defendants raised no objection on the trial because they were being prosecuted under Section 502 as to which such testimony was relevant." 42 F. Supp. at 57.

regulations promulgated thereunder, to wit, a Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App. United States Code, Section 462(b)."

No contention is made that, constitutional questions aside, this language is not technically adequate to charge a violation of subsection (b)(3), the burning statute. However, it would seem to lack three elements necessary to charge non-possession under subsection (b)(6).<sup>43</sup>

First, there is no allegation that respondent was required to register under the Selective Service System. Even assuming he is adequately identified as a male, there is nothing to show that he was not a boy of 17 or an old man of 85, neither of whom would ever have been required to register. See 50 App. U. S. C. §453. Nor can it be rationally assumed that Congress intended the amended subsection (b)(3) to apply only to military age men.

Second, there is no allegation that respondent burned his own registration certificate. Rather he is charged with burning "a Registration Certificate" (emphasis supplied); language which would quite obviously encompass the destruction of anyone else's certificate. It is obviously essential to a non-possession charge that the certificate burned be the defendant's own. Should he burn another's card while his own remains securely in his wallet, he surely cannot be convicted of non-possession.

Third, there is no allegation that respondent ever lost possession of his card. It is not alleged that he did "totally

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<sup>43</sup> For an example of a non-possession indictment, see *United States v. Smith*, 249 F. Supp. 515, 520, fnote. 4 (S. D. Iowa, 1966, aff'd 368 F. 2d 529 (8th Cir. 1966)). This particular count was held faulty for failure to include the word "knowingly" but the Court made no suggestion it was otherwise defective).

mutilate, destroy and change by burning" a certificate. As both the Court of Appeals and the Government have agreed—"a burning in some circumstances would not violate the possession requirement." (R. 71, Government's petition for Cert., p. 7.) For example, one who burns the blank corners of a certificate would still be in possession of the certificate but would nevertheless be an apparent violator of the burning proscription.

To summarize, the test of whether an offense is "necessarily included in the offense charged" turns upon the language of the indictment and the present indictment lacks at least three of the elements to charge non-possession in violation of subsection (b)(6). Thus Rule 31(c), and the doctrine of lesser-included offense is clearly inapplicable. Accordingly the conviction should be reversed and the indictment dismissed.

***B. The Government's contention that respondent should be found guilty by this Court on another theory is without merit.***

Realizing that the lesser-included offense doctrine was improperly relied upon by the Court of Appeals, the Government concedes this point and attempts to fashion its own rationale for allowing a defendant to be convicted upon a charge (other than a lesser-included one) for which he was not indicted. This is violative of the Fifth Amendment and contradicts a well-established line of decisions of this Court.

As a preface to this argument the government tries to suggest that respondent actually was indicted for non-possession. "In its entirety, the indictment may fairly be read as encompassing the charge of non-possession." (Brief, p.



32.) The short answer to this suggestion is that if the government wished to indict a registrant for both the offense of burning and the offense of non-possession then a two count indictment might have been sought, see *U. S. v. Smith*, 249 F. Supp. 515, 520 (S. D. Iowa 1966), aff'd 368 F. 2d 529 (8th Cir. 1966). In *Smith*, after a first count for "burning" that was essentially identical to the indictment herein, Count II was specified:

"On or about the 22nd day of October, 1965, at Iowa City, in the Southern District of Iowa, STEPHEN LYNN SMITH, being a person required to present himself for and submit to registration with the Selective Service System of the United States of America, and being so registered, did fail to have in his personal possession the registration certificate issued to him by the Selective Service System of the United States of America in violation of Title 50 App., Section 460 United States Code, and the regulations promulgated pursuant thereto." *U. S. v. Smith, supra*, at 520, fn. 4.

The palpable difference between the notice provided the defendant in *Smith* and respondent regarding the non-possession offense demonstrates that the indictment herein was for burning and *not* for non-possession. The purpose of the indictment is to give the defendant fair notice of the charge against him in order that he may be able to best prepare for his defense. *Russell v. U. S.*, 369 U. S. 749 (1962); *Kelly v. United States*, 370 F. 2d 227 (D. C. Cir. 1966); *Stirone v. U. S.*, 361 U. S. 212 (1960); *Cole v. Arkansas*, 333 U. S. 196 (1948); *DeJonge v. Oregon*, 299 U. S. 353, 362 (1937). Moreover, the suggestion that the reference to "rules and regulations promulgated thereunder" was an

allusion to the regulation proscribing non-possession and therefore was sufficient to indict respondent for its violation is a rather flagrant violation of the well-established rule that mere quotation of statutory language does not set forth a proper indictment. *The Schooner Hoppet v. U. S.*, 7 Cranch 389 (1813); *Evans v. U. S.*, 153 U. S. 584 (1893); *Russell v. U. S.*, *supra*. In *The Schooner Hoppet*, Chief Justice Marshall stated:

"It is not controverted that in all proceedings in courts of common law, the allegation that the act charged was committed in violation of law, or of the provisions of a particular statute will not justify condemnation, unless, independent of this allegation, a case be stated which shows that the law has been violated. The reference to the statute may direct the attention of the court, and of the accused, to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offense." 7 Cranch at 393. (Emphasis added.)"

"More recently, the vitality of these principles were vigorously reaffirmed in *U. S. v. Russell*, *supra*:

"It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species,—it must descend to particulars.' *United States v. Cruikshank*, 92 U. S. 542, 558. An indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him . . . is defective, although it may follow the language of the statute.' *United States v. Simmons*, 96 U. S. 360, 362. 'In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; . . . ' *United States v. Carl*, 105 U. S. 611, 612. 'Undoubtedly

In its charge to the jury, the trial court stated: "Now, the crime charged is the burning of a draft card. . . . We are not concerned here with anything other than this statute which prohibits the burning or mutilating of a draft card" (R. 34). The Court of Appeals, although affirming the conviction, evinced some doubt as to the soundness of the indictment by its final remark "that any future indictments should be laid under subsection (b)(6) of the statute" (R. 65).<sup>45</sup>

The Government then cites *Williams v. U. S.*, 168 U. S. 382 (1897) and *U. S. v. Hutcheson*, 312 U. S. 219 (1941), apparently in support of the proposition that "In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purports to lay the charge is immaterial" (p. 33). These are indeed appropriate citations. In *Williams* this Court held that "The indorsement on the margin of the indictment constitutes no part of the indictment and does not add to or weaken the legal force

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the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged." *United States v. Hess*, 124 U. S. 483, 487. See also *Pettibone v. United States*, 148 U. S. 197, 202-204; *Blitz v. United States*, 153 U. S. 308, 315; *Keck v. United States*, 172 U. S. 434, 437; *Morissette v. United States*, 342 U. S. 246, 270, n. 30. Cf. *United States v. Petrillo*, 332 U. S. 1, 10-11. That these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7 (c) of the Federal Rules of Criminal Procedure, is illustrated by many recent federal decisions." 369 U. S. at 765-766.

<sup>45</sup> That the Government also had some doubts as to the validity of the indictment to sustain a conviction for non-possession is evident from its Memorandum in response to the cross-petition for certiorari in No. 233, p. 3.

of its averments. We must look to the indictment itself." *Id.* at 389.

In *Williams*, the body of the indictment was substantial and sufficient. Here, not only is there no direct mention of the section number of the non-possession regulation, but the body of the indictment itself does not even suggest the necessary allegations for a non-possession indictment. Moreover, these decisions seem at the very most to support the proposition that an indictment is not demurrable if its sole defect is failure to properly designate the statute. See Government's Memorandum in Response to Cross-Petition in No. 233, p. 3.

***C. The action by the Court of Appeals, as well as the proposal of the Government in this Court, is a denial of due process to a defendant in a criminal case, in violation of the principle laid down in Cole v. Arkansas, 333 U. S. 196 (1948).***

Finally, the Government argues that the jury verdict of guilty necessarily included the finding that the Respondent violated the non-possession statute. Although stating that the crime charged was the violation of the statute proscribing burning of the draft card and nothing else (R. 34), the Court charged the jury that the two elements the government had to prove beyond a reasonable doubt were "one, that the defendant O'Brien burned his draft card and two, that he did it intentionally knowing that it was a wrongful act" (R. 34). As we have indicated, the jury could have convicted respondent of burning without finding three essential elements of the non-possession charge. The court's charge did not even put in issue the extent of burning or whether or not respondent was subject to the Selective Service Act.

But even if every fact necessary for a non-possession conviction was inherent in the burning verdict, the conviction for an offense without an indictment is violative of the Fifth Amendment. The contention of the Government that the sufficiency of the proof, rather than the sufficiency of the indictment determines the validity of the conviction is not a new one. Indeed, this very question was carefully considered by Chief Justice Marshall in *The Schooner Hoppet v. United States*, 7 Cranch 389 (1813):

"The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced.

The reasons for this rule are,

1st. That the party accused may know against what charge to direct his defense.

2. That the court may see with judicial eyes that the fact, alleged to have been committed, is an offense against the laws, and may also discern the punishment annexed by law to the specific offense. . . . It is therefore a maxim of the civil law that a decree must be *secundum alegata* as well as *secundum probata*. It would seem to be a maxim essential to the due administration of justice in all courts." *Id.* at 394-395.

It is axiomatic that "conviction upon a charge not made would be a sheer denial of due process." *DeJonge v. Oregon*, 299 U. S. 353, 362 (1937); *In re Oliver*, 333 U. S. 257 (1948);



*Cole v. Arkansas, supra; Stirone v. U. S.*, 361 U. S. 212 (1960). *Cole* is simply an outstanding example of a line of cases establishing a defendant's constitutional right to be informed of the charge against him by way of indictment and his entitlement to a trial on that charge. Thus the attempt to factually distinguish *Cole* is misplaced. As this Court stated in *Cole*:

"No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. In *re Oliver*, 333 U.S. 257, 68 S.Ct. 499, and cases there cited. If, as the State Supreme Court held, petitioners were charged with a violation of § 1, it is doubtful both that the information fairly informed them of that charge and that they sought to defend themselves against such a charge; it is certain that they were not tried for or found guilty of it. It is as much a violation of process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *De Jonge v. State of Oregon*, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278." 338 U. S. at 201.

The decisions of this Court in *Shuttlesworth v. City of Birmingham*, 382 U. S. 87 (1965) and *Ashton v. Kentucky*, 384 U. S. 195 (1966), as well as *Cole v. Arkansas, supra* require reversal if the court finds that the burning statute is unconstitutional. In *Shuttlesworth*, the Alabama Supreme Court ultimately narrowed what had, at the time of trial, been a clearly unconstitutional ordinance. Thus when

the case reached this Court, the statute could pass constitutional muster. This Court reversed, however, because it was "unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construction of the ordinance". 382 U. S. at 92. Here, as there, it is impossible to tell whether or not the trial court and jury found respondent guilty of only the conduct that was constitutionally protected. Perhaps the jury found nothing more than intent to wilfully burn someone's card and some actual burning. Perhaps they also were influenced by a charge which reflected the same impermissible considerations as those which caused the enactment of an unconstitutional statute."

The Government's contention and the holding of the Court of Appeals is unconstitutional for yet another reason. An important corollary of the right to be charged by sufficient indictment is the rule that a court does not have the power to enlarge an indictment.

"Ever since *Ex parte Bain*, 121 U. S. 1, was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself."

"The *Bain* case, which has never been disapproved, stands for the rule that a court cannot permit a de-

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"The Court of Appeals felt that a remand was necessary for resentencing out of "fairness to the defendant" "upon considerations affirmatively divorced from impermissible factors." R. 65. If there is a danger that the trial court may have been influenced by "impermissible factors", surely there is even a greater danger that the jury may have been so influenced, thereby depriving respondent of his right to a fair trial. See *In re Oliver*, 333 U. S. 257 (1948), and cases cited therein.

fendant to be tried on charges that are not made in the indictment against him. See also *United States v. Norris*, 281 U. S. 619, 622. Cf. *Clyatt v. United States*, 197 U. S. 207, 219, 220. Yet the court did permit that in this case. The indictment here cannot *fairly be read* as charging interference with movements of steel from Pennsylvania to other States nor *does the Court of Appeals appear to have so read it.*" *Id.* at 217. (Emphasis added.) *Stirone v. U. S.*, 361 U. S. 212, 217 (1960) (emphasis added).

The Government's contention that notwithstanding the lack of indictment, respondent can be convicted of non-possession if all the elements of the offense of non-possession were contained in the government's proof and the Judge's charge to the jury cannot meet this constitutional test. Consequently, the judgment of the Court of Appeals finding respondent guilty of non-possession of his draft card should be reversed, and the indictment dismissed.

## POINT V

Should this Court hold that either the lesser included offense doctrine was properly utilized by the Court of Appeals, or that the alternative route for holding the defendant guilty suggested by the Government is appropriate, it should first remand to the Court of Appeals for purpose of allowing full briefing and argument on the constitutionality of the non-possession regulation.

The decision of the Court below which held the statute in question unconstitutional, declared the respondent guilty of violation of another statute. We argue elsewhere that this secondary holding was improper—as the Government concedes—and that the respondent cannot be held guilty on the alternative theory advanced for the first time in this Court.

In order to reach its holding of guilt, the Court of Appeals assumed the constitutionality of the possession regulation, citing only *United States v. Kime*, 188 F. 2d 677 (7th Cir. 1957), cert. den. 342 U. S. 823.<sup>47</sup>

Respondent respectfully urges that such an assumption was not anticipated, and that, consequently, the non-possession question was not systematically presented and argued below by either side. We urge, therefore, that if this Court is disposed to rule on the constitutionality of non-possession it should first remand for a thorough development of the questions and their implications.

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<sup>47</sup> The *Kime* case, while affirming the constitutionality of the possession regulation, is hardly a thorough exposition of the various constitutional questions presented. This Court has never ruled on these questions.

We make this remand suggestion even though our views on the constitutionality of the non-possession regulation are akin to those on the constitutionality of the anti-burning statute. There are certainly similarities between the two which compel the same constitutional treatment. If a draft card's public destruction as a form of peaceful protest constitutes protected symbolic speech, it is no less protected insofar as concerns the possession regulation. See Point II, *supra*. And if the infliction of punishment for this type of verbal conduct—or symbolic speech—by reason of a criminal conviction for willful destruction, is a deprivation of liberty without due process of law, the unconstitutional deprivation occurs no less where the conviction is for non-possession. See Point III, *supra*.

But there are differences as well as similarities. We have argued that the burning statute is uniquely unconstitutional because of the manifested unconstitutional intent. See Point I, *supra*. Obviously this factor would not exist in a case involving non-possession under the regulation.

On the other hand, there are constitutional arguments that may be considered in a non-possession prosecution, which would be absent in a prosecution for destruction or mutilation. To list a few: (1) Whether or not there is Congressional power to require virtually all male citizens (and many aliens as well) over the age of 18 to carry an "internal passport" for the rest of their lives.<sup>48</sup> (2) Whether or not there was a proper delegation of power by Congress to the President and the Selective Service System to enact such regulations, carrying with them the risk of

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<sup>48</sup> There is nothing in the regulations which sets an age limit. Cf. discussion of South Africa's "pass laws" in Landis, *South African Apartheid Legislation II*, 71 Yale L. J. 437, 457-462 (1962).



felony punishment. Cf. *United States v. Laub*, 385 U. S. 475 (1967). (3) Whether there would be a constitutionally significant difference between the validity of such a statute as applied in a peaceful protest context, and as applied as part of a scheme to defraud.

Even though some of these questions may have been intimated in the course of the proceedings below, it is evident they were never extensively and systematically presented and considered. Respondent therefore respectfully urges that these questions are not yet ripe for disposition.<sup>49</sup> It is submitted that this case can be decided without ruling on these questions. However, if the Court feels otherwise, we urge a remand for full and proper development of these questions prior to consideration by this Court.

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<sup>49</sup> There are pending prosecutions for non-possession in various stages of progress. See, e.g., *United States v. Palmour*, Cr. No. A-25,329 (U. S. D. C. for N. D. of Ga.).

## POINT VI

Should the Court reverse the determination of unconstitutionality made by the Court of Appeals it should then hold that the sentence imposed on respondent was unconstitutional both in its term and in its manner of imposition.

**A. *The imposition of an indeterminate term of imprisonment with a maximum of six years of deprivation of liberty for the act of destruction or mutilation of a Selective Service certificate is punishment so shockingly excessive, disproportionate, cruel, unusual and inhumane as to constitute cruel and unusual punishment in violation of the Eighth Amendment.***

The maximum term of imprisonment authorized by the amended statute is five years. 50 U. S. C. App. §462(b). On the other hand, the maximum term authorized by the Federal Youth Corrections Act is six years, the first four of which may be under incarceration. 18 U. S. C. §5010(b), §5017(c). There appears to be a conflict between certain decisions which hold that under these circumstances the maximum permissible term is five years, and other decisions which hold that the whole six years authorized by the Youth Corrections Act is the maximum. Compare *Chapin v. United States*, 341 F. 2d 900 (10th Cir. 1965); *Workman v. United States*, 337 F. 2d 226 (1st Cir. 1964), with *Rogers v. United States*, 326 F. 2d 56 (10th Cir. 1963); *Tatum v. United States*, 310 F. 2d 854 (D. C. Cir. 1962).

But regardless of whether or not the District Court exceeded its jurisdiction by sentencing respondent to six years under the Youth Corrections Act, when the maximum

legal term of punishment was five years, in either case, such a lengthy term of punishment, for the act involved, is so excessive and disproportionate, as to constitute a violation of the Eighth Amendment.

The Eighth Amendment bars "cruel and unusual" punishment. The Chief Justice has explained, in *Trop v. Dulles*, 356 U. S. 86, 99-100, 101 (1958):

"The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy as reflected in these words is firmly established in the Anglo-American tradition of criminal justice."

"The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

Constitutional limits to the length of punishment are established by the "standards of decency" of our society. In 1910, the then prevalent "standards of decency" compelled the striking down of a statute prescribing 12 to 20 years imprisonment for the entry of known false statements in a public record. *Weems v. United States*, 217 U. S. 349 (1910). Cf. *State ex rel. Garvey v. Whitaker*, 48 La. Ann. 527, 19 So. 457 (1896) (six years imprisonment for illegally picking flowers in a public park voided as cruel and unusual punishment because it shocked the conscience of the court); see *People v. Elliot*, 272 Ill. 592, 112 N. E. 300 (1916).<sup>50</sup>

<sup>50</sup> By 1947 the prevalent "standards of decency" had so evolved that four Justices of this Court held it would be cruel and unusual punishment to subject a capital convict to a second attempt at electrocution, the first having failed. *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1947).

Although the Supreme Court has not explicitly reversed a conviction on Eighth Amendment grounds since *Weems*, a number of recent decisions have provided some insights. Thus, in *Trop v. Dulles*, *supra*, Mr. Justice Brennan's concurring opinion condemns punishment which he finds to be nothing "other than forcing retribution from the offender—naked, vengeance." (*Id.* at 112.) And in *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 187 (1963), Mr. Justice Brennan restated his view that punishment was cruel and unusual, in violation of the Eighth Amendment, where it does not have a "rational or necessary connection" with the substantive evil at which it is presumably directed.

In *Robinson v. California*, 370 U. S. 660, 667 (1962), this Court reversed a conviction and 90 day sentence under a California statute which made it a criminal offense for a person to be addicted to the use of narcotics. Mr. Justice Stewart, for the majority, held:

"To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."

In determining contemporary "standards of decency" in Eighth Amendment terms, it will be helpful to compare the statute which is the subject of this indictment to the similar statutory provisions governing alien registration certificates. Had respondent been convicted of destroying an alien registration certificate, rather than a Selective Service System registration certificate, he would have been subject to disproportionately different punishment. Con-

viction of failure to possess an alien registration certificate is a misdemeanor carrying a maximum sentence of thirty days imprisonment and/or \$100 fine. Immigration and Nationality Act of 1952, §264(c); 8 U. S. C. §1304(8).<sup>51</sup> An alien who wilfully fails to register, still a misdemeanor, is subject to a maximum sentence of six months imprisonment and/or \$1,000 fine. *Ibid.*, §266(a); 8 U. S. C. §1306 (a). Only if the defendant has been found guilty of counterfeiting alien registration certificates, can he receive the felony punishment of up to five years imprisonment and/or \$5,000 fine. *Ibid.*, §266(d); 8 U. S. C. §1306(d).

Prior to the 1965 amendment, the evil to which the statute seemed to be directed was the act of making an alteration or change in the registration certificate. Until the words "knowingly destroyed, knowingly mutilated" were added, there was little distinction in penalties between acts of counterfeiting and fraud in connection with alien registration certificates, and similar acts in connection with Selective Service System registration certificates.

It may be arguable that a five (or six) year penalty is not inappropriate for counterfeiting or similar fraudulent act in connection with a certificate issued by a government agency. But respondent's conviction, under this statute, has nothing to do with counterfeiting, fraud, stealth, deceit, or any other attempt to inveigle the government.

Respondent was sentenced to enormously heavy punishment for an act which, even if held to be within Congress' constitutional power, is considerably less heinous than the acts proscribed by the statute prior to the amendment.

<sup>51</sup> Similar misdemeanor punishment involving a maximum penalty of \$100 and/or thirty days imprisonment is imposed for mutilation or defacement of the United States flag. 4 U. S. C. §3.



Such punishment, it is submitted, does not, in the words of this Court, "comport with the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, *supra*, at 101. It does not meet these standards because it is "so disproportionate to the offense committed as to shock the moral sense of the community \* \* \*." 21 Am. Jur. 2d 564 [citing *Weems v. U. S.*, *supra*; *Roberts v. Warden of Md. Penitentiary*, 206 Md. 246, 111 A. 2d 597 (1955); *State v. Evans*, 73 Idaho 50, 245 P. 2d 788 (1952); *Weber v. Commonwealth*, 303 Ky. 56, 196 S.W. 2d 465 (1946); *Cox v. State*, 203 Ind. 550, 181 N. E. 469 (1931)].<sup>52</sup>

**B. The imposition of an indeterminate sentence of up to six years under the Federal Youth Corrections Act in punishment for the burning of a Selective Service registration certificate as a symbolic expression of protest against war, accompanied by statements of the sentencing judge that the duration of the confinement will depend on the defendant's changing his beliefs and associations, is an unconstitutional abridgment of freedom of expression and association protected by the First Amendment, and constitutes cruel and unusual punishment forbidden by the Eighth Amendment.**

The proceedings in the District Court on sentencing as revealed by the record (R. 35-47), disclose that the sentencing judge imposed a six-year maximum indeterminate sentence with the express intent that respondent would serve less than the maximum if he changed his beliefs and

<sup>52</sup> See *Rudolph v. Alabama*, 375 U. S. 889 (1963), opinion by Mr. Justice Goldberg (joined in by Mr. Justice Douglas and Mr. Justice Brennan) dissenting from denial of certiorari and arguing that certiorari should have been granted to consider, *inter alia*, whether death penalty for rape violates "evolving standards of decency" \* \* \* (id. at 890).

# APPENDIX

[1]

**House Report No. 747**  
**House of Representatives**  
**89th Congress—1st Session**

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**PROHIBITION OF DESTRUCTION OR MUTILATION  
OF DRAFT CARDS**

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AUGUST 9, 1965.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. RIVERS of South Carolina, from the Committee on Armed Services, submitted the following

**REPORT**

[To accompany H.R. 10306]

The Committee on Armed Services, to whom was referred the bill (H.R. 10306) to amend the Universal Military Training and Service Act of 1951, as amended, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

**PURPOSE OF THE BILL**

The purpose of the proposed legislation is to provide a clear statutory prohibition against a person knowingly destroying or knowingly mutilating a draft registration card.

**EXPLANATION OF THE BILL**

Section 12(b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides that a person

associations. The Court attempted to extract from respondent a disavowal of his philosophy of pacifism and his personal and organizational friendships and associations. See statement of the case, pp. 9-10, *supra*.

When the respondent remained steadfast, and refused to repudiate his friends, his organization (The Committee for Non-Violent Action), and his ideas, the Court imposed the maximum sentence. The Court expressed its hope that respondent might yet change "if you were removed from the influence of the[se] friends of yours" (R. 42). That the Court expressly conditioned the length of the indeterminate sentence on the respondent's changing his views and associations is candidly demonstrated by the warning that he would serve the full six years if "you are such a hardened case that they can't do anything with you" (R. 42).

The apparent purpose of an indeterminate sentence under the Federal Youth Corrections Act is to allow the prison authorities flexibility in "treatment" of youthful offenders. *United States v. Lane*, 284 F. 2d 935 (9th Cir. 1960). Treatment is defined as "corrective \* \* \* guidance \* \* \* designed to protect the public by correcting the antisocial tendencies of youth offenders." 18 U. S. C. §5006(g).

It is axiomatic that freedom of belief and association are protected by the First Amendment. *NAACP v. Alabama*, 357 U. S. 449 (1958); *Thomas v. Collins*, 323 U. S. 516 (1945). And it should be equally clear that a person convicted of a crime cannot have the terms and conditions of his incarceration and release conditioned upon his abandoning or changing his beliefs and associations. See *Jones v. Commonwealth*, 185 Va. 335, 38 S. E. 2d 444 (1946) (reversing disorderly conduct convictions of juveniles, "sentenced" to attend church and Sunday school each Sunday

for a year, on grounds of unconstitutionality of sentence under First Amendment).

A person under incarceration is obviously deprived of a great deal of his liberty, but he does not surrender all of his rights under the Constitution. He cannot be denied reasonable access to religious services of his own choice, where religious services are made available to other inmates, because of the unorthodoxy of his religion. *Pierce v. LaValle*, 293 F. 2d 233 (2d Cir. 1961); *State v. Cubbage*, 210 A. 2d 555 (Del. 1965) (Black Muslims).

It would be plainly unconstitutional to condition the length of a prisoner's confinement to his abandoning his associations with the Black Muslims, or any other unorthodox religious group. It is similarly unconstitutional to condition the length of his confinement on his repudiation of his pacifist beliefs and associations. The imposition of unconstitutional conditions, particularly conditions impinging on freedom of belief and association, renders invalid governmental action which is otherwise valid. See *Speiser v. Randall*, 357 U. S. 513 (1958).

A defendant may be young enough to come within the ambit of special statutes dealing with the "treatment" or "rehabilitation" of juvenile or youthful offenders. But this does not mean that he can be deprived of the right to be fairly treated, *In re Gault*, 387 U. S. 1 (1967), and it certainly does not mean that a court can paternalistically force its own views on him. Juvenile courts may not order young persons to refrain from constitutionally protected civil rights demonstrations. *Griffin v. Hay*, 10 Race Rel. L. Rep. 111 (E. D. Va. 1965). See *In re Wright*, 251 F. Supp. 880 (M. D. Ala. 1965). Similarly, a Federal Court may not order a young pacifist, convicted of a Selective Service vio-



lation, to abandon his anti-war, anti-draft beliefs and associations, at the peril of serving the longest sentence which the Court can fashion.

It is submitted that such a sentence is not only a violation of First Amendment rights. It is likewise out of harmony with the "evolving standards of decency" that should characterize a civilized society, where freedom of belief and association are cherished. See *Trop v. Dulles*, *supra*. As such, it is cruel and unusual punishment, forbidden by the Eighth Amendment.

### CONCLUSION

For the reasons stated, it is respectfully submitted as follows:

1. This Court should affirm so much of the judgment of the court below as held the statute unconstitutional.

2. So much of the judgment below as held the respondent guilty under the doctrine of lesser included offense should be reversed and the indictment dismissed either on the ground (a) that the doctrine of lesser included offense was not properly applied, (b) that due process considerations preclude the respondent's being held guilty under the theory advanced by the Government or any other theory; or (c) that the regulation penalizing non-possession is likewise unconstitutional.

3. In the alternative, if the Court affirms the holding below of unconstitutionality of the burning statute, it should not rule on the question of non-possession until such

question has been ruled on by the courts below, and for that purpose the case should be remanded.

4. If this Court should reverse the First Circuit's holding of unconstitutionality of the burning statute, it should review the constitutionality of the sentence in accordance with point VI *supra*, and for the reasons set forth therein it should reverse the judgment below on the grounds that the term and/or manner of sentencing were in violation of the Eighth and First Amendments.

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January 1968

*House Report No. 747*

who forges, alters, or in any manner changes his draft registration card, or any notation duly and validly inscribed thereon, will be subject to a fine of \$10,000 or imprisonment of not more than 5 years. H.R. 10306 would amend this provision to make it apply also to those persons who knowingly destroy or knowingly mutilate a draft registration card.

The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

While the present provisions of the Criminal Code with respect to the destruction of Government property may appear broad enough [2] to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished.

To this end, H.R. 10306 makes specific that knowingly mutilating or knowingly destroying a draft card constitutes a violation of the Universal Military Training and Service Act and is punishable thereunder; and that a person who does so destroy or mutilate a draft card will be subject to a fine of not more than \$10,000 or imprisonment of not more than 5 years.

**House Report No. 747****COMMITTEE POSITION**

The Committee on Armed Services, a quorum being present, by a vote of 19 to 1 agreed to favorably report H.R. 10306 to the House of Representatives.

**FISCAL DATA**

Enactment of this legislation will not involve the expenditure of any Federal funds.

**CHANGES IN EXISTING LAW**

In compliance with paragraph 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill are shown as follows (changes in existing law are printed in *italic*):

**SECTION 462(b) (3) OF TITLE 50, UNITED STATES CODE****462. Offenses and penalties**

(a) . . .

(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys, knowingly mutilates* or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints,

*House Report No. 747*

or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title, or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to [3] exceed \$10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury.



## Congressional Record—House

[19134]

August 10, 1965

PROHIBITION OF DESTRUCTION OR MUTILATION  
OF DRAFT CARDS

Mr. RIVERS of South Carolina. Mr. Speaker, I ask unanimous consent that the Committee of the Whole House on the State of the Union be discharged from further consideration of the bill (H.R. 10306) to amend the Universal Military Training and Service Act of 1951, as amended; and for its immediate consideration.

The Clerk read the title of the bill:

The SPEAKER. Is there objection to the request of the gentleman from South Carolina?

There was no objection.

The Clerk read the bill, as follows:

## H.R. 10306

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the [19135] Universal Military Training and Service Act, as amended, is hereby further amended as follows:*

SECTION 1. Section 12(b)(3) is amended to read as follows:

“(3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or”.

Mr. GROSS. Mr. Speaker, I move to strike the last word. I believe we should have an explanation of the bill.

Mr. RIVERS of South Carolina. Mr. Speaker, will the gentleman yield?

*Congressional Record—House*

**Mr. GROSS.** I yield to the gentleman from South Carolina.

**Mr. RIVERS** of South Carolina. Mr. Speaker, the bill, H.R. 10306, amends the Universal Military Training and Service Act to establish a clear statutory provision against a person knowingly destroying or knowingly mutilating a draft card. Existing law provides a penalty for anyone forging or altering a draft card, but there is no specific prohibition against destroying or mutilating a draft card.

The purpose of the bill is clear. It merely amends the draft law by adding the words "knowingly destroys and knowingly mutilates" draft cards. A person who is convicted would be subject to a fine up to \$10,000 or imprisonment up to 5 years. It is a straightforward clear answer to those who would make a mockery of our efforts in South Vietnam by engaging in the mass destruction of draft cards.

We do not want to make it illegal to mutilate or destroy a card per se, because sometimes this can happen by accident. But if it can be proved that a person knowingly destroyed or mutilated his draft card, then under the committee proposal, he can be sent to prison, where he belongs. This is the least we can do for our men in South Vietnam fighting to preserve freedom, while a vocal minority in this country thumb their noses at their own Government.

**Mr. GROSS.** Mr. Speaker, the gentleman from South Carolina in his usual lucid manner has convinced me that this is a very good bill, and I am ready and willing and able to withdraw my reservation.

**Mr. BRAY.** Mr. Speaker, I move to strike out the last word.

(Mr. BRAY asked and was given permission to revise and extend his remarks.)

**Mr. BRAY.** Mr. Speaker, the bill that we have before us today is simple and easy to understand. H.R. 10306 is an

*Congressional Record—House*

amendment to our selective service law providing that it is illegal to knowingly mutilate or destroy a draft card. It is already illegal to alter, forge or change such a card.

The need of this legislation is clear. Beatniks and so-called "campus-cults" have been publicly burning their draft cards to demonstrate their contempt for the United States and our resistance to Communist takeovers. Such actions have been suggested and led by college professors—professors supported by taxpayers' money.

At Rutgers University, Prof. Eugene Geonese [Genovese], who prides himself on being a Marxist, publicly said that he "welcomed a Communist Vietcong victory." The board of governors refused to dismiss him.

Just yesterday such a mob attacking the United States and praising the Vietcong attempted to march on the Capitol but were prevented by the police from forcibly moving into our Chambers. They were led by a Yale University professor. They were generally a filthy, sleazy beatnik gang; but the question which they pose to America is quite serious.

These so-called "student" mobs at home and abroad make demands and threats; they hurl rocks and ink bottles at American buildings; they publicly mutilate or burn their draft cards; they even desecrate the American flag. Chanting and screaming vile epithets, these mobs of so-called "students" and Communist "stooges" attempt to create fear and destroy self-confidence in our country and its citizens and to downgrade the United States in the eyes of the world.

Such organized "student" groups in the United States have sent congratulations and money to Ho Chi Minh and have made anonymous and insulting calls to families of our servicemen killed in Vietnam.

This proposed legislation to make it illegal to knowingly destroy or mutilate a draft card is only one step in

*Congressional Record—House*

bringing some legal control over those who would destroy American freedom. This legislation, if passed, will be of some assistance to our country if the officers and courts charged with the enforcement of the law will have the energy, courage, and guts to make use of it.

The growing disrespect for our law and institutions in America holds a real threat to our country and to our freedom. Just 5 short years ago no one would have believed that disrespect for our country could have grown to the proportions that it has today.

Disrespect for our American heritage and anti-American demonstrations are all a part of the cold war in some way directed by those who would destroy us. The Communist world is aware that it cannot destroy the effectiveness of the United States by the use of its economic and military strength, because we are far stronger in these fields than it is and we outdistance it more every year.

Then how is the Communist victory to be brought about? The Communists are planning to use the "Judas goats" to lead those who are free to defect from freedom. So-called "students" and Communist stooges here and abroad, by demonstrations of anti-American feeling, by belittling, and by vilification are to downgrade the United States in the eyes of the world and shake the confidence and faith of our citizens in our democratic way of life. They hope to attain victory over freedom by subversion within the United States and by erosion of our national pride and confidence in the greatness of America and our national heritage.

One of America's greatest sources of strength in discouraging these demonstrations is to pause and consider the greatness of America—to appreciate what our country has done for the benefit of mankind. Let us have a rebirth of patriotism. Let us be proud, possessed not of an arrogant pride, but a humble pride in our greatness, in our heritage.

*Congressional Record—House*

Aside from becoming the strongest country economically and militarily during the last quarter century, this country, without any desire to gain a square foot of territory, has been the principal force in overthrowing the armed might of Hitler and Japan. The strength of the United States saved both Europe and Asia from the despotic rule of tyrants. We asked nothing in return. We asked no gain for this victory brought about by American dollars, American production, and American youth. The people of the United States have unselfishly contributed more to the feeding, care, welfare, and rehabilitation of the world than has all of the rest of the world combined. All of this has been done without any thought of gain except the reward of the deed itself.

The United States, without hope of personal gain, blocked the Communist takeover of South Korea and today is assuming the major role of blocking Communist slavery in southeast Asia. Yet there are today those in America who are weak at heart, those of little faith in the greatness of America and freedom, those who are naive and refuse to face up to the realities of Communist aggression. There are those who in various degrees and for various reasons ask our Government to yield more and more to Communist aggression.

Our Government, through fear of the public opinion at home and abroad of our enemies, is failing to adequately enforce our laws on subversion and antigovernmental attacks. That is exactly as our enemies have planned it. In the exercise of our great ideals of fairness and tolerance, we seem to forget that it is axiomatic that a government must protect its citizenry against illegal acts and against mob violence. When decent, productive people are forced to support and coddle criminals and other dregs and drones of society, chaos, degradation, and ruin are inevitable.



*Congressional Record—House*

Tolerance ceases to be a virtue when it condones evil. Governmental tolerance ceases to be a virtue when it allows mob violence on the law-abiding members of its society—when it winks at unlawful disrespect to its institutions and the flag. This is true whether this tolerance is the result of apathy, a maudlin sympathy, or a fear of the opinions of enemies.

When the mob once learns that its actions will lead to granting of its demands and its actions are condoned, there is a multiplication both of its demonstrations, riots, and wanton destruction, and of its demands.

If these "revolutionaries" are permitted to deface and destroy their draft cards, our entire Selective Service System is dealt a serious blow.

Mr. Speaker, I strongly urge all my fellow Members to support this legislation.

[19136] The SPEAKER. The question is on engrossment and third reading of the bill.

The bill was ordered to be engrossed and read a third time and was read the third time.

The SPEAKER. The question is on passage of the bill.

The question was taken.

Mr. HALL. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

The Doorkeeper will close the doors, the Sergeant at Arms will notify absent Members, and the Clerk will call the roll.

The question was taken; and there were—yeas 393, nays 1, not voting 40, as follows:

*Congressional Record—House*

[Roll No. 230]

YEAS—393

Abbitt	Boggs	Cohelan
Abernethy	Boland	Collier
Adair	Bolling	Conte
Addabbo	Bolton	Cooley
Albert	Bow	Corbett
Anderson, Ill.	Bray	Corman
Anderson, Tenn.	Brock	Craley
Andrews,	Brooks	Cramer
George W.	Broomfield	Culver
Andrews,	Brown, Calif.	Curtin
Glenn	Broyhill, N. C.	Curtis
Andrews,	Broyhill, Va.	Daddario
N. Dak.	Buchanan	Dague
Annunzio	Burke	Daniels
Arends	Burleson	Davis, Ga.
Ashbrook	Burton, Calif.	Davis, Wis.
Ashley	Burton, Utah	Dawson
Ashmore	Byrne, Pa.	de la Garza
Aspinall	Byrnes, Wis.	Delaney
Ayres	Cabell	Dent
Baldwin	Callan	Denton
Bandstra	Callaway	Derwinski
Baring	Carey	Devine
Barrett	Casey	Dickinson
Bates	Cederberg	Dingell
Battin	Celler	Dole
Beckworth	Chamberlain	Donohue
Belcher	Chelf	Dorn
Bell	Clancy	Dow
Bennett	Clark	Dowdy
Berry	Clausen,	Downing
Betts	Don H.	Dulski
Bingham	Clawson, Del.	Duncan, Oreg.
Blatnik	Cleveland	Duncan, Tenn.
	Clevenger	Dwyer

*Congressional Record—House*

Dyal  
 Edmondson  
 Edwards, Ala.  
 Edwards, Calif.  
 Ellsworth  
 Erlenborn  
 Evans, Colo.  
 Everett  
 Fallon  
 Farbstein  
 Farnsley  
 Farnum  
 Fascell  
 Feighan  
 Findley  
 Fino  
 Fisher  
 Flood  
 Flynt  
 Fogarty  
 Foley  
 Ford, Gerald R.  
 Ford,  
     William D.  
 Fountain  
 Fraser  
 Frelinghuysen  
 Friedel  
 Fulton, Pa.  
 Fulton, Tenn.  
 Fuqua  
 Gallagher  
 Garmatz  
 Gathings  
 Gettys

Giaimo  
 Gibbons  
 Gilbert  
 Gilligan  
 Gonzalez  
 Goodell  
 Grabowski  
 Gray  
 Green, Pa.  
 Greigg  
 Grider  
 Griffin  
 Griffiths  
 Gross  
 Grover  
 Gubser  
 Gurney  
 Hagan, Ga.  
 Hagen, Calif.  
 Haley  
 Hall  
 Halleck  
 Halpern  
 Hamilton  
 Hanley  
 Hanna  
 Hansen, Idaho  
 Hansen, Iowa  
 Hansen, Wash.  
 Hardy  
 Harris  
 Harsha  
 Harvey, Ind.  
 Harvey, Mich.  
 Hathaway

Hébert  
 Hechler  
 Helstoski  
 Henderson  
 Herlong  
 Hicks  
 Holifield  
 Holland  
 Horton  
 Howard  
 Hull  
 Hungate  
 Huot  
 Hutchinson  
 Ichord  
 Jacobs  
 Jarman  
 Jennings  
 Joelson  
 Johnson, Calif.  
 Johnson, Okla.  
 Johnson, Pa.  
 Jonas  
 Jones, Ala.  
 Jones, Mo.  
 Karsten  
 Karth  
 Kastenmeier  
 Kee  
 Keith  
 Kelly  
 King, Utah  
 Kirwan  
 Kluczynski  
 Kornegay

*Congressional Record—House.*

Krebs	Matthews	O'Neill, Mass.
Kunkel	May	Ottinger
Laird	Meeds	Passman
Landrum	Michel	Patman
Langen	Miller	Patten
Latta	Mills	Pepper
Leggett	Minish	Perkins
Lennon	Mink	Philbin
Lipscomb	Minshall	Pickle
Long, La.	Mize	Pike
Long, Md.	Moeller	Poage
Love	Monagan	Poff
McClory	Moore	Powell
McCulloch	Moorehead	Price
McDade	Morgan	Pucinski
McDowell	Morris	Purcell
McEwen	Morse	Quie
McFar	Morton	Quillen
McGrath	Mosher	Race
McMillan	Moss	Randall
McVicker	Multer	Redlin
Macdonald	Murphy, Ill.	Reid, Ill.
MacGregor	Murphy, N. Y.	Reid, N. Y.
Machen	Murray	Reifel
Mackay	Natcher	Reinecke
Mackie	Nedzi	Resnick
Madden	Nelsen	Reuss
Mahon	Nix	Rhodes, Ariz.
Maillard	O'Brien	Rhodes, Pa.
Marsh	O'Hara, Ill.	Rivers, S. C.
Martin, Ala.	O'Hara, Mich.	Rivers, Alaska
Martin, Mass.	O'Konski	Roberts
Martin, Nebr.	Olsen, Mont.	Robison
Mathias	Olson, Minn.	Rodino
Matsunaga	O'Neal, Ga.	Rogers, Colo.

*Congressional Record—House*

Rogers, Fla.	Smith, Calif.	Vigorito
Rogers, Tex.	Smith, Va.	Vivian
Ronan	Springer	Waggonner
Rooney, N. Y.	Stafford	Walker, Miss.
Rooney, Pa.	Staggers	Walker, N. Mex.
Roosevelt	Stalbaum	Watkins
Rosenthal	Stanton	Watson
Rostenkowski	Steed	Watts
Roudebush	Stephens	Weltner
Roush	Stratton	Whalley
Rumsfeld	Stubblefield	White, Idaho
Satterfield	Sweeney	White, Tex.
St. Germain	Talcott	Whitener
St. Onge	Taylor	Whitten
Saylor	Teague, Calif.	Widnall
Scheuer	Teague, Tex.	Williams
Schisler	Tenzer	Wilson, Bob
Schneebeli	Thompson, N. J.	Wilson,
Schweiker	Thompson, Tex.	Charles H.
Secrest	Thomson, Wis.	Wolff
Seldon	Todd	Wright
Senner	Trimble	Wyatt
Shipley	Tunney	Wydler
Shriver	Tuten	Yates
Sickles	Udall	Young
Sikes	Ullman	Younger
Sisk	Utt	Zablocki
Skubitz	Van Deerlin	
Slack	Vanik	

NAYS—1

Smith, N. Y.

NOT VOTING—40

Adams  
Bonner  
Brademas

Brown, Ohio  
Cahill  
Cameron

Carter  
Colmer  
Conable



*Congressional Record—House*

Conyers	King, Calif.	Ryan
Cunningham	King, N. Y.	Schmidhauser
Diggs	Lindsay	Scott
Evins, Tenn.	McCarthy	Smith, Iowa
Green, Oreg.	Morrison	Sullivan
Hawkins	Pelly	Thomas
Hays	Pirnie	Toll
Hosmer	Pool	Tuck
Irwin	Roncalio	Tupper
Keogh	Roybal	Willis

So the bill was passed.

The Clerk announced the following pairs:

Mr. Keogh with Mr. Brown of Ohio.  
 Mr. Roncalio with Mr. Pelly.  
 Mr. Toll with Mr. Lindsay.  
 Mr. Colmer with Mr. Carter.  
 Mr. Roybal with Mr. Hosmer.  
 Mr. Pool with Mr. Cunningham.  
 Mrs. Sullivan with Mr. Tupper.  
 Mr. Thomas with Mr. King of New York.  
 Mr. Morrison with Mr. Conable.  
 Mr. King of California with Mr. Pirnie.  
 Mr. Hays with Mr. Ryan.  
 Mr. Brademas with Mr. Diggs.  
 Mr. McCarthy with Mr. Conyers.  
 Mr. Tuck with Mrs. Green of Oregon.  
 Mr. Hawkins with Mr. Irwin.  
 Mr. Smith of Iowa with Mr. Scott.  
 Mr. Evins of Tennessee with Mr. Adams.  
 Mr. Cameron with Mr. Bonner.  
 Mr. Willis with Mr. Schmidhauser.

The result of the vote was announced as above recorded.

The doors were opened.

A motion to reconsider was laid on the table.

**Congressional Record—Senate**

[19012]

**August 10, 1965****MUTILATION OR DESTRUCTION OF DRAFT CARDS  
SHOULD BE A CRIMINAL OFFENSE**

**Mr. THURMOND.** Mr. President, recently the public and officials of our country have been appalled by reports of mass public burnings of draft registration cards. It is not fitting for our country to permit such conduct while our people are giving their lives in combat with the enemy.

The law now makes it a criminal offense to forge or alter a draft registration card. Certainly it should be just as serious an offense to mutilate or destroy a draft card.

Last week, the chairman of the Armed Services Committee in the House of Representatives introduced a bill to make the mutilation or destruction of a draft card a criminal offense. In order that this matter may be expedited in the Senate, I send to the desk a similar bill and ask that it be appropriately referred. It is my hope that hearings will be held promptly and expeditiously on this proposal.

**The PRESIDING OFFICER.** The bill will be received and appropriately referred.

The bill (S. 2381) to amend the Universal Military Training and Service Act of 1951, introduced by **Mr. THURMOND**, was received, read twice by its title, and referred to the Committee on Armed Services.

**Senate Report No. 589**

[1]

**Senate—Calendar No. 572****89th Congress—1st Session**

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**PROHIBITION OF DESTRUCTION OR MUTILATION  
OF DRAFT CARDS**

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**AUGUST 12, 1965.—Ordered to be printed**

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**Mr. THURMOND**, from the Committee on Armed Services,  
submitted the following

**REPORT****[To accompany S. 2381]**

The Committee on Armed Services, to which was referred the bill (S. 2381) to amend the Universal Military training and Service Act, as amended, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

**AMENDMENT**

The amendment is as follows:

Strike out lines 5 and 6 and substitute in place thereof the following:

**SECTION 1.** Section 12(b)(3) is amended to read as follows:

*Senate Report No. 589***EXPLANATION OF AMENDMENT**

The amendment is a technical one to correct the designation of the section to be amended.

**PURPOSE**

This bill would make a person who knowingly destroys or knowingly mutilates a draft registration card subject to a fine of not more than \$10,000 or imprisonment of not more than 5 years, or both.

**EXPLANATION OF THE BILL**

Section 12(b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides, among other things, that a person who forges, alters, or changes a draft registration certificate is subject to a fine of not more than \$10,000 or imprisonment of not more than 5 years, or both. There is no explicit prohibition in this section against the knowing destruction or mutilation of such cards.

[2] The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.

For a person to be subject to fine or imprisonment the destruction or mutilation of the draft card must be "knowingly" done. This qualification is intended to protect persons who lose or mutilate draft cards accidentally.

**CHANGES IN EXISTING LAW**

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law proposed to be made by the bill are shown as follows (new matter is printed in *italics*, and existing law in which no change is proposed is shown in *roman*):

*Senate Report No. 589*

## SECTION 462(b)(3) OF TITLE 50, UNITED STATES CODE

**462. Offenses and penalties**

(a) . . .

(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder; or (2) who, with intent that it be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, *knowingly destroys*, *knowingly mutilates*, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title, or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed \$10,000 or be imprisoned for not more than five years, or both. Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of any certificate not duly issued to him, such possession shall be deemed sufficient evidence to establish an intent to use such certificate for purposes of false identification or representation, unless the defendant explains such possession to the satisfaction of the jury.



**Congressional Record—Senate**

[19669]

**August 13, 1965****AMENDMENT OF THE UNIVERSAL MILITARY  
TRAINING AND SERVICE ACT OF 1951, AS  
AMENDED**

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 573, H.R. 10306.

The PRESIDING OFFICER. The bill will be stated by title.

The LEGISLATIVE CLERK. A bill (H.R. 10306) to amend the Universal Military Training and Service Act of 1951, as amended.

The PRESIDING OFFICER. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. THURMOND. Mr. President, yesterday the Senate Committee on Armed Services unanimously reported Senate bill 2381. H.R. 10306 is identical with S. 2381, as amended. Since the bills are identical, I should like to make a statement on the pending bill.

The bill amends the Universal Military Training and Service Act, which appears in the appendix to title 50 of the United States Code, to include a clear statutory prohibition against any person knowingly destroying or knowingly mutilating a draft card. The existing law already provides prohibition against the altering of a draft card as well as a number of offenses [sic] connected with the selective service registration, but there now is no specific prohibition against the willful destruction or mutilation of a draft card.

Recent incidents of mass destruction of draft cards constitute open defiance of the war-making powers of the Government and have demonstrated an urgent need for this legislation.

*Congressional Record—Senate*

The criminal prohibitions instituted by this bill would be limited to willful incidents. The prohibition would not apply to instances where draft cards were destroyed or mutilated by inadvertence.

The President has acknowledged that our country is engaged in a war. Attempts to interfere with the Universal Military Training Act or service in the Armed Forces constitute treason in time of war. Such conduct as public burnings of draft cards and public pleas for persons to refuse to register for their draft should not and must not be tolerated by a society whose sons, brothers, and husbands are giving their lives in defense of freedom and countrymen against Communist aggression.

The PRESIDING OFFICER. The bill is open to amendment. If there be no amendment to be proposed, the question is on the third reading of the bill.

The bill (H.R. 10306) was ordered to a third reading, read the third time, and passed.

Mr. MANSFIELD. Mr. President, I move to reconsider the vote by which the bill was passed.

Mr. THURMOND. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. THURMOND. Mr. President, I ask unanimous consent to postpone indefinitely further consideration of Senate bill 2381.

The PRESIDING OFFICER. Without objection, it is so ordered.



FEB 12 1968

SUPREME COURT. U. S.

Nos. 232 and 233

IN THE  
**Supreme Court of the United States**

October Term, 1967

UNITED STATES OF AMERICA

*Petitioner*

v.

DAVID PAUL O'BRIEN

DAVID PAUL O'BRIEN

*Petitioner*

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIRST CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF  
AMICI CURIAE AND BRIEF**

JAMES D. ST. CLAIR

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Jr.*

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*Attorney for Marcus Raskin*

LEONARD B. BOUDIN

30 East 42nd Street  
New York, New York  
*Attorney for Benjamin Spock  
Attorneys for Amici Curiae.*

IN THE  
**Supreme Court of the United States**

October Term, 1967

Nos. 232 and 233

---

UNITED STATES OF AMERICA

*Petitioner*

v.

DAVID PAUL O'BRIEN

---

DAVID PAUL O'BRIEN

*Petitioner*

v.

UNITED STATES OF AMERICA

---

ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT

---

**MOTION FOR LEAVE TO FILE BRIEF  
AMICI CURIAE**

William Sloane Coffin, Jr., Michael Ferber, Mitchell Goodman, Marcus Raskin and Benjamin Spock move the Court for an order permitting them to file the attached brief *amici curiae*. Their interest lies in the fact that they were indicted by a federal grand jury in the District of Massachusetts for conspiracy to counsel Selective Service registrants to fail to have in their possession their registration certificates and notices of classification. A copy of the indictment appears in the appendix to this motion.



*Motion for Leave to File Brief Amici Curiae*

The applicants respectfully suggest that the Court should not render a decision on the merits as to the construction and constitutionality of Selective Service Regulations relating to the possession of registration certificates and notices of classification. In the applicants' view those issues are not squarely presented by the instant case and should be deferred to a case which does present the issues. These questions can then be fully briefed and argued.

The application was not made within the time required by Rule 42(2) of this Court because the applicants were not indicted until January 5, 1968 and did not retain counsel until some time thereafter.

The Solicitor General has declined to consent to this application. Counsel for the respondent-petitioner O'Brien have given their consent.

JAMES D. ST. CLAIR,  
ABRAHAM GOLDSTEIN,  
*Attorneys for William Sloane Coffin, Jr.*

WILLIAM P. HOMANS, JR.,  
*Attorney for Michael Ferber.*

EDWARD BARSHAK,  
*Attorney for Mitchell Goodman.*

TELFORD TAYLOR,  
*Attorney for Marcus Raskin.*

LEONARD B. BOUDIN,  
*Attorney for Benjamin Spock.*  
*Attorneys for Amici Curiae.*

February 6, 1968.

**APPENDIX**

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MASSACHUSETTS**

**Indictment—Criminal No. 68-1-F**

**(50 U.S.C. App. 462(a))**

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**UNITED STATES OF AMERICA**

**v.**

**WILLIAM SLOANE COFFIN, JR., MICHAEL FERBER, MITCHELL  
GOODMAN, MARCUS RASKIN and BENJAMIN SPOCK**

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1. From on or about August 1, 1967, and continuously thereafter up to and including the date of the return of this indictment, in the District of Massachusetts, the Southern District of New York, the District of Columbia and elsewhere, William Sloane Coffin, Jr. of New Haven in the District of Connecticut, Michael Ferber of Boston in the District of Massachusetts, Mitchell Goodman of New York in the Southern District of New York, Marcus Raskin of the District of Columbia, and Benjamin Spock of New York in the Southern District of New York, the defendants herein, did unlawfully, wilfully and knowingly combine, conspire, confederate, and agree together and with each other, and with diverse other persons, some known and others unknown to the Grand Jury, to commit offenses against the United States, that is,

a. to unlawfully, knowingly and wilfully counsel, aid and abet diverse Selective Service registrants to unlaw-

fully, knowingly and wilfully neglect, fail, refuse and evade service in the armed forces of the United States and all other duties required of registrants under the Universal Military Training and Service Act (50 U.S.C. App. 451-471) and the rules, regulations and directions duly made pursuant to said Act, in violation of 50 U.S.C. App. 462(a).

b. to unlawfully, knowingly and wilfully counsel, aid and abet diverse Selective Service registrants to unlawfully, knowingly and wilfully neglect, fail and refuse to have in their personal possession at all times their registration certificates (SSS Form No. 2), prepared by their local boards, as required by the rules, regulations and directions (32 C.F.R. 1617.1) duly made pursuant to the provisions of the said Universal Military Training and Service Act, in violation of 50 U.S.C. App. 462(a);

c. to unlawfully, knowingly and wilfully counsel, aid and abet diverse Selective Service registrants to unlawfully, knowingly and wilfully neglect, fail and refuse to have in their personal possession at all times valid notices of classification (SSS Form No. 110) which had been issued to them by their local boards showing their current classifications, as required by the rules, regulations and directions (32 C.F.R. 1623.5) duly made pursuant to the provisions of the said Universal Military Training and Service Act, in violation of 50 U.S.C. App. 462(a);

d. to unlawfully, wilfully and knowingly hinder and interfere, by any means, with the administration of the Universal Military Training and Service Act, in violation of 50 U.S.C. App. 462(a).

2. It was a part of said conspiracy that the defendants William Sloane Coffin, Jr., Mitchell Goodman, Marcus Raskin and Benjamin Spock would sponsor and support a nation-wide program of resistance to the functions and operations of the Selective Service System, which said pro-

gram would include, but not be limited to, the interruption of the induction process at induction centers throughout the United States, the public counselling of Selective Service registrants to resist the draft, to refuse to serve in the armed forces of the United States, to surrender their valid Selective Service notices of classification and registration certificates, and the aiding and abetting of such registrants in such activities.

3. It was a further part of said conspiracy that on October 16, 1967, the defendants William Sloane Coffin, Jr., and Michael Ferber and other co-conspirators, some known and others unknown to the Grand Jury, would conduct and participate in a public meeting at the Arlington Street Church, Boston, Massachusetts, which said meeting would be attended by Selective Service registrants.

4. It was a further part of said conspiracy that at the aforesaid public meeting on October 16, 1967, the said Selective Service registrants would surrender possession of their valid notices of classification and their registration certificates.

5. It was a further part of said conspiracy that at the aforesaid public meeting on October 16, 1967, the defendant William Sloane Coffin, Jr. and other co-conspirators, some known and others unknown to the Grand Jury, would accept possession of the aforesaid notices of classification and registration certificates from the said Selective Service registrants for the purpose of tendering the same to the Attorney General of the United States.

6. It was a further part of said conspiracy that the defendants WILLIAM SLOANE COFFIN, JR., MICHAEL FERBER, MITCHELL GOODMAN, MARCUS RASKIN and BENJAMIN SPOCK would accompany a large number of Selective Service registrants and other individuals to the Building of the

United States Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. on October 20, 1967, and participate in a demonstration of resistance against the operations and functions of the Selective Service System.

7. It was a further part of said conspiracy that at the aforesaid demonstration, valid notices of Selective Service classifications and Selective Service registration certificates surrendered and collected at various demonstrations of resistance to the functions and operations of the Selective Service System previously held in various communities throughout the United States, including those surrendered and collected at the aforesaid meeting conducted at the Arlington Street Church in Boston, Massachusetts on October 16, 1967, would be collected by Michael Ferber and other co-conspirators, some known and others unknown to the Grand Jury, and deposited in a common repository.

8. It was a further part of said conspiracy that at the aforesaid demonstration at the United States Department of Justice the defendant William Sloane Coffin, Jr. would address Selective Service registrants and others participating and in attendance at such demonstration, publicly counselling said registrants to continue in their resistance against the draft, to continue to refuse to serve in the armed forces of the United States as long as the war in Vietnam continued and pledging himself and others to aid and abet said registrants in all ways possible.

9. It was a further part of said conspiracy that the defendants William Sloane Coffin, Jr., Mitchell Goodman, Marcus Raskin and Benjamin Spock and other co-conspirators would enter the Building of the United States Department of Justice on said October 20, 1967, and would deliver to the Attorney General of the United States the aforesaid repository containing the said notices of classification and registration certificates.



## OVERT ACTS

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. During the month of August, 1967, the exact date being to the grand jurors unknown, the defendants William Sloane Coffin, Jr. and Benjamin Spock distributed and caused to be distributed at New York, New York, a statement entitled "A Call to Resist Illegitimate Authority".

2. On October 2, 1967, the defendants William Sloane Coffin, Jr., Mitchell Goodman, Marcus Raskin and Benjamin Spock held a press conference at the New York Hilton Hotel, Rockefeller Center, New York, New York.

3. On October 16, 1967, the defendant Michael Ferber gave a speech entitled "A Time To Say No" at a meeting at the Arlington Street Church, Boston, Massachusetts.

4. On October 16, 1967, the defendant William Sloane Coffin, Jr., gave a speech at a meeting at the Arlington Street Church, Boston, Massachusetts.

5. On October 16, 1967, the defendant William Sloane Coffin, Jr. accepted notices of classification and registration certificates from Selective Service registrants at a meeting at the Arlington Street Church, Boston, Massachusetts.

6. On October 20, 1967, the defendant William Sloane Coffin, Jr., spoke at a demonstration of resistance against the operations and functions of the Selective Service System at the United States Department of Justice Building, 10th and Constitution Avenue, N.W., Washington, D.C., publicly counselling Selective Service registrants to continue in their resistance against the draft and to continue to refuse to serve in the armed forces.

7. On October 20, 1967, the defendant William Sloane Coffin, Jr., entered the United States Department of Justice Building, 10th and Constitution Avenue, N.W., Washington, D.C.

8. On October 20, 1967, the defendant Marcus Raskin entered the United States Department of Justice Building, 10th and Constitution Avenue, N.W., Washington, D.C.

9. On October 20, 1967, the defendant Benjamin Spock entered the United States Department of Justice Building, 10th and Constitution Avenue, N.W., Washington, D.C.

10. On October 20, 1967, the defendant Mitchell Goodman entered the United States Department of Justice Building, 10th and Constitution Avenue, N.W., Washington, D.C.

11. On October 20, 1967, in the Andretta Room, United States Department of Justice, Washington, D.C. the defendants William Sloane Coffin, Jr., Mitchell Goodman, Marcus Raskin, Benjamin Spock and other co-conspirators abandoned a fabricoid briefcase containing approximately one hundred eighty-five (185) registration certificates and one hundred seventy-two (172) notices of classification together with other materials.

IN THE  
**Supreme Court of the United States**

October Term, 1967

Nos. 232 and 233

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UNITED STATES OF AMERICA

*Petitioner*

v.

DAVID PAUL O'BRIEN

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DAVID PAUL O'BRIEN

*Petitioner*

v.

UNITED STATES OF AMERICA

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ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT

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**BRIEF FOR AMICI CURIAE**

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**I.**

The instant case presents in the view of the *amici curiae* very serious constitutional problems with respect to the 1965 amendment to the Universal Military Training Service Act, 50 U.S.C. App. § 462(b)(3), as amended, 79 Stat. 586, which the parties have briefed so thoroughly as not to require additional comment.

It does not present the very different problems as to the construction and constitutionality of 32 C.F.R. 1617.1 and 1623.5 which are directly involved in the indictment of the *amici curiae*, a copy of which is attached to their motion.

Those provisions were not set forth in the indictment, were not the subject of the trial judge's charge, and were not the basis of the jury's verdict of guilty in the instant case.

Those regulations were not the subject of the parties' briefs in the Court of Appeals which made them the basis for its judgment of affirmance. The tenuous ground of that court's action may be seen from its reliance upon an ambiguous passage in a memorandum submitted by defense counsel in the district court upon a motion to dismiss the indictment (R. 64). Even the briefs submitted by the parties in this Court do not address themselves with any depth to the issue of possession of draft registration certificates and notices of classification. We think that they were correct in not doing so because that issue is not fairly before the Court for the reasons stated by Mr. O'Brien's counsel.

The *amici curiae*, defendants in the Boston case, are the Chaplain of Yale University, a graduate student at Harvard University, a writer, a scholar in the field of public policy who is the Co-Director of the Institute for Policy Studies, and an internationally known pediatrician and writer. The core of the indictment in that case appears to be an alleged conspiracy to counsel the surrender of registration certificates and notices of classification. Counsel may address themselves at the trial itself and in such appellate courts as may become necessary to the issue of whether it is a crime not to possess such documents.

The following questions, among others, which have not been briefed in the *O'Brien* case will then present themselves:

(1) Did Congress intend that every violation of "this title or rules and regulations promulgated pursuant thereto relating to the issuance, transfer or possession of such certificate" be made criminally punishable by a fine of \$10,000 or imprisonment for five years, or both?

(2) Does not 32 C.F.R. 1617.1—the provision relied upon by the Court of Appeals in *O'Brien*, entitled *Effect of Failure to Have Unaltered Registration Certificate in Personal Possession*—mean what its title implies, that the only effect of non-possession is to make it *prima facie* evidence of non-registration?

(3) More specifically, did Congress intend to make non-possession of a certificate a criminal act?

(4) If Congress intended more, (a) where are the legislative standards for the delegation of authority (see *Kent v. Dulles*, 357 U.S. 116), (b) what legislative purpose is advanced by such a regulation—unless the certificate is an internal passport which every citizen must show to the authorities on demand, and (c) is it consistent with due process to require the carrying of such a document?

(5) Is the surrender of the certificate—to the Government itself—a form of protest protected by the First Amendment?

These are some of the issues which in an appropriate case should be presented to this Court. We do not believe this to be that case for the reasons suggested by Mr. O'Brien's counsel. If they are to be considered by the Court in the *O'Brien* case we believe that there should be reargument and the filing of briefs by the parties and by the *amici curiae* directed to those and related issues.

## II.

Furthermore, since the gravamen of the conspiracy indictment against *amici curiae* is alleged counselling of persons to commit acts allegedly in violation of the selective service laws, governmental regulation of speech is directly involved and at issue in their case. Among the overt acts by one or more defendants alleged to be in furtherance of this alleged conspiracy are: the distribution of a written statement with respect to the draft and the war in Vietnam, a press conference in New York City,



speeches at a church in Boston, and public counselling of Selective Service registrants at a demonstration at the Department of Justice in Washington, D. C.

None of these allegations or alleged overt acts of this character are present in the record of the *O'Brien* case. These aspects of the prosecution of *amici curiae* raise serious and complex constitutional questions under the First Amendment. These questions will receive extensive factual and legal presentation at the trial of *amici curiae*.

It would be regrettable, we respectfully suggest, if this Court, in the course of deciding the *O'Brien* case, were to foreclose future judicial consideration on a fully developed factual record of the many complex questions of governmental regulation of speech arising in the case of *amici curiae*. If the relationship of the First Amendment to speech and writing about the draft laws and the war in Vietnam is to be decided by this Court in *O'Brien*, *amici curiae* believe that they should have the opportunity to brief and argue these questions before this Court.

Respectfully submitted,

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*Attorneys for Amici Curiae.*

February 6, 1968.



JUN 20 1968

JOHN F. DAVIS, CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1967

Nos. 232 and 233

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UNITED STATES OF AMERICA,

*Petitioner,*

—v.—

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*Respondent.*

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DAVID PAUL O'BRIEN,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

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**PETITION FOR REHEARING AND PETITION FOR  
STAY OF MANDATE PENDING REHEARING**

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IN THE  
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UNITED STATES OF AMERICA,

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*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

---

**PETITION FOR REHEARING AND PETITION FOR  
STAY OF MANDATE PENDING REHEARING**

Pursuant to Rule 58(1) of the Rules of this Court, David Paul O'Brien, the respondent in No. 232, and the petitioner in No. 233 (hereinafter "petitioner"), respectfully prays for a rehearing of the judgment of this Court dated May 27, 1968. Petitioner likewise respectfully prays, pursuant to Rule 59(2) of the Rules of this Court, for an order staying the mandate of this Court pending the determination of this petition for rehearing.

In accordance with Rule 58(1) the grounds of this petition for rehearing are briefly and distinctly stated as follows:

1. Petitioner, who was convicted by the United States District Court for the District of Massachusetts, for violation of the 1965 amendment to Title 50 App. U. S. C. §462(b)(3), which made it a felony to knowingly destroy or knowingly mutilate a Selective Service certificate, was sentenced, pursuant to the Federal Youth Corrections Act, 18 U. S. C. §5010(b), "to the custody of the Attorney General for a maximum period of six years for supervision and treatment." *United States v. O'Brien*, 36 U. S. L. Week 4469, Opinion of this Court May 27, 1968, footnote 2.<sup>1</sup>

2. In the appeal of his conviction to the United States Court of Appeals for the First Circuit, petitioner urged among other grounds that imposition of the six year maximum sentence violated his constitutional rights in that:

(a) The imposition of an indeterminate term of imprisonment with a maximum of six years of deprivation of liberty for the act of destruction or mutilation of a Selective Service certificate is punishment so excessive and disproportionate, as to constitute cruel and unusual punishment in violation of the Eighth Amendment; and

(b) the imposition of an indeterminate sentence of up to six years under the Federal Youth Corrections Act for burning a Selective Service registration certificate as a symbolic expression of protest against war, accompanied

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<sup>1</sup> There is no other mention of the six year sentence in any of the three opinions written in this case.



by statements of the sentencing judge that the duration of the confinement will depend on the defendant's changing his beliefs and associations, is an unconstitutional abridgment of freedom of expression and association protected by the First Amendment, and constitutes cruel and unusual punishment forbidden by the Eighth Amendment.

3. The First Circuit held the statute unconstitutional, *O'Brien v. United States*, 376 F. 2d 538 (1st Cir. 1967) on grounds other than those urged with respect to the sentence and the manner of sentencing. Indeed, the First Circuit did not reach or discuss these grounds. The First Circuit did, however, find petitioner guilty of the "lesser included offense" of violation of the Selective Service regulation requiring possession of one's Selective Service certificate. However, the First Circuit observed that the sentence might have been imposed upon the basis of a statute held to be unconstitutional and that to "measure the sentence by the nature of his communication, would be to punish defendant, pro tanto, for exactly what the First Amendment protects". 376 F. 2d at 542. Consequently, the First Circuit affirmed the conviction, but held "that fairness to the defendant requires that he be resentenced upon considerations affirmatively divorced from impermissible factors." *Ibid.* The remand direction of the First Circuit was that the District Court "vacate the sentence, and . . . resentence as it may deem appropriate in the light of this opinion." *Ibid.*

4. The Government petitioned this Court for a writ of certiorari urging that the First Circuit erred in holding the statute unconstitutional, the view adopted by this Court's judgment of May 27, 1968. The Government's petition for

certiorari did not raise any of the questions concerning sentence and sentencing. O'Brien cross-petitioned this Court for a writ of certiorari. The cross petition was limited to the contention that O'Brien could not be constitutionally convicted of violation of the non-possession regulation under the lesser included offense theory. O'Brien's cross-petition did not urge any aspect of the questions of sentence or the manner of sentencing because the posture of the case at such time was that the existing sentence had been vacated. Under the circumstances, O'Brien's counsel did not feel it appropriate to cross-petition this Court on an issue which was not then before the Court.

5. However, in the preparation of O'Brien's brief before this Court, O'Brien's counsel reasoned that it was possible that this Court, if it reversed the First Circuit on the main grounds urged by the Government, might then be prepared to consider the constitutional questions raised in connection with the sentence and the manner of sentencing. Therefore, arguments in support of such contentions were set forth as Point VI in O'Brien's brief (pp. 71 through 78). For the convenience of the Court, Point VI of such brief is reprinted verbatim as an appendix to this petition.

6. The judgment of this Court, reversing the First Circuit, reinstated the judgment and sentence of the District Court. This Court did not consider the point concerning sentence and the manner of sentencing set forth in Point VI of O'Brien's brief, apparently for the reason set forth in footnote 31 at the conclusion of the Chief Justice's opinion:

"31 The other issues briefed by O'Brien were not raised in the petition for certiorari in No. 232 or in the

cross-petition in No. 233. Accordingly, those issues are not before the Court.”<sup>2</sup>

7. Consequently, questions of constitutional import concerning a six year maximum sentence for the burning of a Selective Service certificate and the manner of the imposition of such sentence were not ruled on either by the First Circuit or by this Court. Upon the issuance of the mandate of this Court, petitioner will therefore be subject to imprisonment for up to six years without the constitutionality of his sentence ever having been determined.

8. Counsel for petitioner have attempted to verify and can advise the Court on their best information and belief that such six year maximum sentence is the harshest sentence yet imposed on any person convicted of this offense. Other sentences imposed have ranged from sentences of probation, *United States v. Smith*, 249 F. Supp. 515 (S. D. Iowa 1966), aff'd 368 F. 2d 529 (8th Cir. 1966); *United States v. Wilson* (unreported, S. D. N. Y. 1966); to sentence of six months, *United States v. Edelman, et al.* (unreported, S. D. N. Y. 1966), aff'd 384 F. 2d 115 (2d Cir. 1967) cert. den. *United States v. Cornell, et al.*, 36 U. S. L. Week 3473 (June 10, 1968); to a one-year sentence, *United States v. Sullivan* (unreported, S. D. N. Y. 1966); to a sentence of 2½ years imposed for violation of conditions of probation of a prior suspended sentence, see *United States v. Miller*, 249 F. Supp. 259 (S. D. N. Y. 1965) aff'd 367 F. 2d 72 (2d

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<sup>2</sup> There was likewise no discussion of either the sentence or the manner of sentencing during oral argument. O'Brien's counsel intended to reach these points, but because of the interest of members of the Court in questioning counsel on other aspects of the case the time for argument concluded before counsel had an opportunity to raise these questions.

Cir. 1966) cert. den. 386 U. S. 911 (1967), motion for leave to file petition for rehearing den. 36 U. S. L. Week 3474 (June 10, 1968).

9. It is respectfully submitted that these questions are serious and substantial. It can reasonably be expected that any sentences of long duration which may be imposed by District Courts for violations of either the burning statute, or the non-possession regulation, will invariably raise the question of constitutionality under the Eighth Amendment. Recent opinions of this Court this Term have shown this Court's continuing consideration of the importance of sentencing procedures under contemporary standards. See *Witherspoon v. Illinois*, 36 U. S. L. Week 4504 (June 3, 1968); *United States v. Jackson*, 36 U. S. L. Week 4277 (April 8, 1968). It is therefore a matter of public importance in the administration of the penal statute now held constitutional for this Court to dispose of these questions at this time, in a case where they have been specifically and legitimately raised.

## CONCLUSION

For the foregoing reasons petitioner respectfully prays:

1. That the petition for rehearing be granted on the limited point set forth herein; or, in the alternative,

2. that this Court modify its prior judgment and direct that the case be remanded to the Court of Appeals to consider constitutionality of the sentence and the manner of sentencing; and

3. that pursuant to Rule 59(2) the mandate of this Court be stayed pending the determination of this petition.

Respectfully submitted,

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**Certificate of Counsel Pursuant to Rule 58**

I, **MARVIN M. KARPATKIN**, counsel for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

**MARVIN M. KARPATKIN**

## APPENDIX

## POINT VI

Should the Court reverse the determination of unconstitutionality made by the Court of Appeals it should then hold that the sentence imposed on respondent was unconstitutional both in its term and in its manner of imposition.

- A. The imposition of an indeterminate term of imprisonment with a maximum of six years of deprivation of liberty **APPENDIX** destruction or mutilation of a Selective Service certificate is punishment so shockingly excessive, disproportionate, cruel, unusual and inhumane as to constitute cruel and unusual punishment in violation of the Eighth Amendment.

The maximum term of imprisonment authorized by the amended statute is five years. 50 U. S. C. App. §462(b). On the other hand, the maximum term authorized by the Federal Youth Corrections Act is six years, the first four of which may be under incarceration, 18 U. S. C. §5019(b), 1917(a). There appears to be a conflict between certain decisions which hold that under these circumstances the maximum permissible term is five years, and other decisions which hold that the whole six years authorized by the Youth Corrections Act is the maximum. Compare *Chapin v. United States*, 521 F. 2d 900 (10th Cir. 1965); *Workman v. United States*, 337 F. 2d 226 (1st Cir. 1964), with *Rogers v. United States*, 326 F. 2d 56 (10th Cir. 1963); *Tatum v. United States*, 310 F. 2d 804 (D. C. Cir. 1962).

## APPENDIX

### POINT VI

Should the Court reverse the determination of unconstitutionality made by the Court of Appeals it should then hold that the sentence imposed on respondent was unconstitutional both in its term and in its manner of imposition.

- A. *The imposition of an indeterminate term of imprisonment with a maximum of six years of deprivation of liberty for the act of destruction or mutilation of a Selective Service certificate is punishment so shockingly excessive, disproportionate, cruel, unusual and inhumane as to constitute cruel and unusual punishment in violation of the Eighth Amendment.***

The maximum term of imprisonment authorized by the amended statute is five years. 50 U. S. C. App. §462(b). On the other hand, the maximum term authorized by the Federal Youth Corrections Act is six years, the first four of which may be under incarceration. 18 U. S. C. §5010(b), §5017(c). There appears to be a conflict between certain decisions which hold that under these circumstances the maximum permissible term is five years, and other decisions which hold that the whole six years authorized by the Youth Corrections Act is the maximum. Compare *Chapin v. United States*, 341 F. 2d 900 (10th Cir. 1965); *Workman v. United States*, 337 F. 2d 226 (1st Cir. 1964), with *Rogers v. United States*, 326 F. 2d 56 (10th Cir. 1963); *Tatum v. United States*, 310 F. 2d 854 (D. C. Cir. 1962).

But regardless of whether or not the District Court exceeded its jurisdiction by sentencing respondent to six years under the Youth-Corrections Act, when the maximum legal term of punishment was five years, in either case, such a lengthy term of punishment, for the act involved, is so excessive and disproportionate, as to constitute a violation of the Eighth Amendment.

The Eighth Amendment bars "cruel and unusual" punishment. The Chief Justice has explained, in *Trop v. Dulles*, 356 U. S. 86, 99-100, 101 (1958):

"The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy as reflected in these words is firmly established in the Anglo-American tradition of criminal justice."

. . . . .

"The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

Constitutional limits to the length of punishment are established by the "standards of decency" of our society. In 1910, the then prevalent "standards of decency" compelled the striking down of a statute prescribing 12 to 20 years imprisonment for the entry of known false statements in a public record. *Weems v. United States*, 217 U. S. 349 (1910). Cf. *State ex rel. Garvey v. Whitaker*, 48 La. Ann. 527, 19 So. 457 (1896) (six years imprisonment for illegally picking flowers in a public park voided as cruel and unusual punishment because it shocked the conscience of the court); see *People v. Elliot*, 272 Ill. 592, 112 N. E. 300 (1916).<sup>50</sup>

<sup>50</sup> By 1947 the prevalent "standards of decency" had so evolved that four Justices of this Court held it would be cruel and unusual

Although the Supreme Court has not explicitly reversed a conviction on Eighth Amendment grounds since *Weems*, a number of recent decisions have provided some insights. Thus in *Trop v. Dulles*, *supra*, Mr. Justice Brennan's concurring opinion condemns punishment which he finds to be nothing "other than forcing retribution from the offender—naked vengeance." (*Id.* at 112.) And in *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 187 (1963), Mr. Justice Brennan restated his view that punishment was cruel and unusual, in violation of the Eighth Amendment, where it does not have a "rational or necessary connection" with the substantive evil at which it is presumably directed.

In *Robinson v. California*, 370 U. S. 660, 667 (1962), this Court reversed a conviction and 90 day sentence under a California statute which made it a criminal offense for a person to be addicted to the use of narcotics. Mr. Justice Stewart, for the majority, held:

"To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."

In determining contemporary "standards of decency" in Eighth Amendment terms, it will be helpful to compare the statute which is the subject of this indictment to the similar statutory provisions governing alien registration certificates. Had respondent been convicted of destroying an alien registration certificate, rather than a Selective

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punishment to subject a capital convict to a second attempt at electrocution, the first having failed. *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1947).



Service System registration certificate, he would have been subject to disproportionately different punishment. Conviction of failure to possess an alien registration certificate is a misdemeanor carrying a maximum sentence of thirty days imprisonment and/or \$100 fine. Immigration and Nationality Act of 1952, §264(c); 8 U. S. C. §1304(8).<sup>51</sup> An alien who wilfully fails to register, still a misdemeanor, is subject to a maximum sentence of six months imprisonment and/or \$1,000 fine. *Ibid.*, §266(a); 8 U. S. C. §1306 (a). Only if the defendant has been found guilty of counterfeiting alien registration certificates, can he receive the felony punishment of up to five years imprisonment and/or \$5,000 fine. *Ibid.*, §266(d); 8 U. S. C. §1306(d)..

Prior to the 1965 amendment, the evil to which the statute seemed to be directed was the act of making an alteration or change in the registration certificate. Until the words "knowingly destroyed, knowingly mutilated" were added, there was little distinction in penalties between acts of counterfeiting and fraud in connection with alien registration certificates, and similar acts in connection with Selective Service System registration certificates.

It may be arguable that a five (or six) year penalty is not inappropriate for counterfeiting or similar fraudulent act in connection with a certificate issued by a government agency. But respondent's conviction, under this statute, has nothing to do with counterfeiting, fraud, stealth, deceit, or any other attempt to inveigle the government.

Respondent was sentenced to enormously heavy punishment for an act which, even if held to be within Congress' constitutional power, is considerably less heinous than the

<sup>51</sup> Similar misdemeanor punishment involving a maximum penalty of \$100 and/or thirty days imprisonment is imposed for mutilation or defacement of the United States flag. 4 U. S. C. §3.

acts proscribed by the statute prior to the amendment. Such punishment, it is submitted, does not, in the words of this Court, "comport with the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, *supra*, at 101. It does not meet these standards because it is "so disproportionate to the offense committed as to shock the moral sense of the community \* \* \*." 21 Am. Jur. 2d 564 [citing *Weems v. U. S.*, *supra*; *Roberts v. Warden of Md. Penitentiary*, 206 Md. 246; 111 A. 2d 597 (1955); *State v. Evans*, 73 Idaho 50, 245 P. 2d 788 (1952); *Weber v. Commonwealth*, 303 Ky. 56, 196 S. W. 2d 465 (1946); *Cox v. State*, 203 Ind. 550, 181 N. E. 469 (1931)].<sup>52</sup>

**B. The imposition of an indeterminate sentence of up to six years under the Federal Youth Corrections Act in punishment for the burning of a Selective Service registration certificate as a symbolic expression of protest against war, accompanied by statements of the sentencing judge that the duration of the confinement will depend on the defendant's changing his beliefs and associations, is an unconstitutional abridgment of freedom of expression and association protected by the First Amendment, and constitutes cruel and unusual punishment forbidden by the Eighth Amendment.**

The proceedings in the District Court on sentencing as revealed by the record (R. 35-47), disclose that the sentencing judge imposed a six-year maximum indeterminate

<sup>52</sup> See *Rudolph v. Alabama*, 375 U. S. 889 (1963), opinion by Mr. Justice Goldberg (joined in by Mr. Justice Douglas and Mr. Justice Brennan) dissenting from denial of certiorari and arguing that certiorari should have been granted to consider, *inter alia*, whether death penalty for rape violates "evolving standards of decency" \* \* \* (id. at 890).

sentence with the express intent that respondent would serve less than the maximum if he changed his beliefs and associations. The Court attempted to extract from respondent a disavowal of his philosophy of pacifism and his personal and organizational friendships and associations. See statement of the case, pp. 9-10, *supra*.

When the respondent remained steadfast, and refused to repudiate his friends, his organization (The Committee for Non-Violent Action), and his ideas, the Court imposed the maximum sentence. The Court expressed its hope that respondent might yet change "if you were removed from the influence of the[se] friends of yours" (R. 42). That the Court expressly conditioned the length of the indeterminate sentence on the respondent's changing his views and associations is candidly demonstrated by the warning that he would serve the full six years if "you are such a hardened case that they can't do anything with you" (R. 42).

The apparent purpose of an indeterminate sentence under the Federal Youth Corrections Act is to allow the prison authorities flexibility in "treatment" of youthful offenders. *United States v. Lane*, 284 F. 2d 935 (9th Cir. 1960). Treatment is defined as "corrective \* \* \* guidance \* \* \* designed to protect the public by correcting the anti-social tendencies of youth offenders." 18 U. S. C. §5006(g).

It is axiomatic that freedom of belief and association are protected by the First Amendment. *NAACP v. Alabama*, 357 U. S. 449 (1958); *Thomas v. Collins*, 323 U. S. 516 (1945). And it should be equally clear that a person convicted of a crime cannot have the terms and conditions of his incarceration and release conditioned upon his abandoning or changing his beliefs and associations. See *Jones v. Commonwealth*, 185 Va. 335, 38 S. E. 2d 444 (1946) (reversing disorderly conduct convictions of juveniles, "sen-

tenced" to attend church and Sunday school each Sunday for a year, on grounds of unconstitutionality of sentence under First Amendment).

A person under incarceration is obviously deprived of a great deal of his liberty, but he does not surrender all of his rights under the Constitution. He cannot be denied reasonable access to religious services of his own choice, where religious services are made available to other inmates, because of the unorthodoxy of his religion. *Pierce v. Lavalley*, 293 F. 2d 233 (2d Cir. 1961); *State v. Cubbage*, 210 A. 2d 555 (Del. 1965) (Black Muslims).

It would be plainly unconstitutional to condition the length of a prisoner's confinement to his abandoning his associations with the Black Muslims, or any other unorthodox religious group. It is similarly unconstitutional to condition the length of his confinement on his repudiation of his pacifist beliefs and associations. The imposition of unconstitutional conditions, particularly conditions impinging on freedom of belief and association, renders invalid governmental action which is otherwise valid. See *Speiser v. Randall*, 357 U. S. 513 (1958).

A defendant may be young enough to come within the ambit of special statutes dealing with the "treatment" or "rehabilitation" of juvenile or youthful offenders. But this does not mean that he can be deprived of the right to be fairly treated, *In re Gault*, 387 U. S. 1 (1967), and it certainly does not mean that a court can paternalistically force its own views on him. Juvenile courts may not order young persons to refrain from constitutionally protected civil rights demonstrations. *Griffin v. Hay*, 10 Race Rel. L. Rep. 111 (E. D. Va. 1965). See *In re Wright*, 251 F. Supp. 880 (M. D. Ala. 1965). Similarly, a Federal Court may not order a young pacifist, convicted of a Selective Service vio-



lation, to abandon his anti-war; anti-draft beliefs and associations, at the peril of serving the longest sentence which the Court can fashion.

It is submitted that such a sentence is not only a violation of First Amendment rights. It is likewise out of harmony with the "evolving standards of decency" that should characterize a civilized society, where freedom of belief and association are cherished. See *Trop v. Dulles, supra*. As such, it is cruel and unusual punishment, forbidden by the Eighth Amendment.



# SUPREME COURT OF THE UNITED STATES

Nos. 232 AND 233.—OCTOBER TERM, 1967.

United States, Petitioner,  
232 v.

David Paul O'Brien.

David Paul O'Brien, Petitioner,  
233 v.

United States.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the First Circuit.

[May 27, 1968.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

On the morning of March 31, 1966, David Paul O'Brien and three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse. A sizable crowd, including several agents of the Federal Bureau of Investigation, witnessed the event.<sup>1</sup> Immediately after the burning, members of the crowd began attacking O'Brien and his companions. An FBI agent ushered O'Brien to safety inside the courthouse. After he was advised of his right to counsel and to silence, O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law. He produced the charred remains of the certificate, which, with his consent, were photographed.

For this act, O'Brien was indicted, tried, convicted, and sentenced in the United States District Court for the

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<sup>1</sup> At the time of the burning, the agents knew only that O'Brien and his three companions had burned small white cards. They later discovered that the card O'Brien burned was his registration certificate, and the undisputed assumption is that the same is true of his companions.

District of Massachusetts.<sup>2</sup> He did not contest the fact that he had burned the certificate. He stated in argument to the jury that he burned the certificate publicly to influence others to adopt his antiwar beliefs, as he put it, "so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position."

The indictment upon which he was tried charged that he "wilfully and knowingly did mutilate, destroy, and change by burning . . . [his] Registration Certificate (Selective Service System Form No. 2); in violation of Title 50, App., United States Code, Section 462 (b)." Section 462 (b) is part of the Universal Military Training and Service Act of 1948. Section 462 (b)(3), one of six numbered subdivisions of § 462 (b), was amended by Congress in 1965, 79 Stat. 586 (adding the words italicized below), so that at the time O'Brien burned his certificate an offense was committed by any person,

"who forges, alters, *knowingly destroys, knowingly mutilates*, or in any manner changes any such certificate . . . ." (Italics supplied.)

In the District Court, O'Brien argued that the 1965 Amendment prohibiting the knowing destruction or mutilation of certificates was unconstitutional because it was enacted to abridge free speech, and because it served no legitimate legislative purpose.<sup>3</sup> The District Court re-

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<sup>2</sup> He was sentenced under the Youth Correction Act, 18 U. S. C. § 5010 (b), to the custody of the Attorney General for a maximum period of six years for supervision and treatment.

<sup>3</sup> The issue of the constitutionality of the 1965 Amendment was raised by counsel representing O'Brien in a pretrial motion to dismiss the indictment. At trial and upon sentencing, O'Brien chose to represent himself. He was represented by counsel on his appeal to the Court of Appeals.

jected these arguments, holding that the statute on its face did not abridge First Amendment rights, that the court was not competent to inquire into the motives of Congress in enacting the 1965 Amendment, and that the Amendment was a reasonable exercise of the power of Congress to raise armies.

On appeal, the Court of Appeals for the First Circuit held the 1965 Amendment unconstitutional as a law abridging freedom of speech.<sup>4</sup> At the time the Amendment was enacted, a regulation of the Selective Service System required registrants to keep their registration certificates in their "personal possession at all times." 32 CFR § 1617.1 (1962).<sup>5</sup> Wilful violations of regulations promulgated pursuant to the Universal Military Training and Service Act were made criminal by statute. 50 U. S. C. App. § 462 (b)(6). The Court of Appeals, therefore, was of the opinion that conduct punishable under the 1965 Amendment was already punishable under the nonpossession regulation, and consequently that the Amendment served no valid purpose; further, that in light of the prior regulation, the Amendment must have been "directed at public as distinguished from private destruction." On this basis, the Court concluded that the 1965 Amendment ran afoul of the First Amendment by singling out persons engaged in protests for special treatment. The Court ruled, however, that O'Brien's conviction should be affirmed under the statutory provision, 50 U. S. C. App. § 462 (b)(6), which in its view made violation of the nonpossession regulation a crime, because it regarded such violation to be a lesser

<sup>4</sup> *O'Brien v. United States*, 376 F. 2d 538 (C. A. 1st Cir. 1967).

<sup>5</sup> The portion of 32 CFR relevant to the instant case was revised as of January 1, 1967. Citations in this opinion are to the 1962 edition which was in effect when O'Brien committed the crime, and when Congress enacted the 1965 Amendment.

included offense of the crime defined by the 1965 Amendment.<sup>6</sup>

The Government petitioned for certiorari, in No. 232, arguing that the Court of Appeals erred in holding the statute unconstitutional, and that its decision conflicted with decisions by the Court of Appeals for the Second<sup>7</sup> and Eighth Circuits<sup>8</sup> upholding the 1965 Amendment against identical constitutional challenges. O'Brien cross-petitioned for certiorari, in No. 233, arguing that the Court of Appeals erred in sustaining his conviction on the basis of a crime of which he was neither charged nor tried. We granted the Government's petition to resolve the conflict in the circuits, and we also granted O'Brien's cross-petition. We hold that the 1965 Amendment is constitutional both as enacted and as applied. We therefore vacate the judgment of the Court of Appeals and reinstate the judgment and sentence of the District Court without reaching the issue raised by O'Brien in No. 233.

### I.

When a male reaches the age of 18, he is required by the Universal Military Training and Service Act to register with a local draft board.<sup>9</sup> He is assigned a Selective

<sup>6</sup> The Court of Appeals nevertheless remanded the case to the District Court to vacate the sentence and resentence O'Brien. In the Court's view, the district judge might have considered the violation of the 1965 Amendment as an aggravating circumstance in imposing sentence. The Court of Appeals subsequently denied O'Brien's petition for a rehearing, in which he argued that he had not been charged, tried, or convicted for nonpossession, and that nonpossession was not a lesser included offense of mutilation or destruction. *O'Brien v. United States*, 376 F. 2d 538, 542 (C. A. 1st Cir. 1967).

<sup>7</sup> *United States v. Miller*, 367 F. 2d 72 (C. A. 2d Cir. 1966), cert. denied, 386 U. S. 911 (1967).

<sup>8</sup> *Smith v. United States*, 368 F. 2d 529 (C. A. 8th Cir. 1966).

<sup>9</sup> See 62 Stat. 605 (1948), as amended, 65 Stat. 76 (1951), 50 U. S. C. App. § 453 (1964); 32 CFR § 1613.1 (1962).



Service number,<sup>10</sup> and within five days he is issued a registration certificate (SSS Form No. 2).<sup>11</sup> Subsequently, and based on a questionnaire completed by the registrant,<sup>12</sup> he is assigned a classification denoting his eligibility for induction,<sup>13</sup> and "[a]s soon as practicable" thereafter he is issued a Notice of Classification (SSS Form No. 110).<sup>14</sup> This initial classification is not necessarily permanent,<sup>15</sup> and if in the interim before induction the registrant's status changes in some relevant way, he may be reclassified.<sup>16</sup> After such a reclassification, the local board "as soon as practicable" issues to the registrant a new Notice of Classification.<sup>17</sup>

Both the registration and classification certificates are small white cards, approximately 2 by 3 inches. The registration certificate specifies the name of the registrant, the date of registration, and the number and address of the local board with which he is registered. Also inscribed upon it are the date and place of the registrant's birth, his residence at registration, his physical description, his signature, and his Selective Service number. The Selective Service number itself indicates his State of registration, his local board, his year of birth, and his chronological position in the local board's classification record.<sup>18</sup>

The classification certificate shows the registrant's name, Selective Service number, signature, and eligibility classification. It specifies whether he was so classified by his local board, an appeal board, or the President. It

<sup>10</sup> 32 CFR § 1621.2 (1962).

<sup>11</sup> 32 CFR § 1613.3a (1962).

<sup>12</sup> 32 CFR §§ 1621.9, 1623.1 (1962).

<sup>13</sup> 32 CFR §§ 1623.1, 1623.2 (1962).

<sup>14</sup> 32 CFR § 1623.4 (1962).

<sup>15</sup> 32 CFR § 1625.1 (1962).

<sup>16</sup> 32 CFR §§ 1625.1, 1625.2, 1625.3, 1625.4, and 1625.11 (1962).

<sup>17</sup> 32 CFR § 1625.12 (1962).

<sup>18</sup> 32 CFR § 1621.2 (1962).



contains the address of his local board and the date the certificate was mailed.

Both the registration and classification certificates bear notices that the registrant must notify his local board in writing of every change in address, physical condition, and occupational, marital, family, dependency, and military status, and of any other fact which might change his classification. Both also contain a notice that the registrant's Selective Service number should appear on all communications to his local board.

Congress demonstrated its concern that certificates issued by the Selective Service System might be abused well before the 1965 Amendment here challenged. The 1948 Act, 62 Stat. 604, itself prohibited many different abuses involving "any registration certificate, . . . or any other certificate issued pursuant to or prescribed by the provisions of this title, or rules or regulations promulgated hereunder . . . ." 62 Stat. 622 (1948). Under § 12 (b)(1)-(5) of the 1948 Act, it was unlawful (1) to transfer a certificate to aid a person in making false identification; (2) to possess a certificate not duly issued with the intent of using it for false identification; (3) to forge, alter, "or in any manner" change a certificate or any notation validly inscribed thereon; (4) to photograph or make an imitation of a certificate for the purpose of false identification; and (5) to possess a counterfeited or altered certificate. 62 Stat. 622 (1948). In addition, as previously mentioned, regulations of the Selective Service System required registrants to keep both their registration and classification certificates in their personal possession at all times. 32 CFR § 1617.1 (1962) (Registration Certificates);<sup>19</sup> 32 CFR § 1623.5

<sup>19</sup> 32 CFR § 1617.1 (1962), provides, in relevant part:

"Every person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate (SSS Form No. 2)

(1962) (Classification Certificates).<sup>20</sup> And § 12 (b)(6) of the Act, 62 Stat. 622-623 (1948), made knowing violation of any provision of the Act or rules and regulations promulgated pursuant thereto a felony.

By the 1965 Amendment, Congress added to § 12 (b)(3) of the 1948 Act the provision here at issue, subjecting to criminal liability not only one who "forges, alters, or in any manner changes" but also one who "knowingly destroys, [or] knowingly mutilates" a certificate. We note at the outset that the 1965 Amendment plainly does not abridge free speech on its face, and we do not understand O'Brien to argue otherwise. Amended § 12 (b)(3) on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct. The Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. Compare *Stromberg v. California*, 283 U. S. 359 (1931).<sup>21</sup> A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers' licenses, or a tax law prohibiting the destruction of books and records.

prepared by his local board which has not been altered and on which no notation duly and validly inscribed thereon has been changed in any manner after its preparation by the local board. The failure of any person to have his Registration Certificate (SSS Form No. 2) in his personal possession shall be prima facie evidence of his failure to register."

<sup>20</sup> 32 CFR § 1623.5 (1962), provides, in relevant part:

"Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form No. 2), a valid Notice of Classification (SSS Form No. 110) issued to him showing his current classification."

<sup>21</sup> See text, *infra*, at p. —.

O'Brien nonetheless argues that the 1965 Amendment is unconstitutional in its application to him, and is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of speech." We consider these arguments separately.

## II.

O'Brien first argues that the 1965 Amendment is unconstitutional as applied to him because his act of burning his registration certificate was protected "symbolic speech" within the First Amendment. His argument is that the freedom of expression which the First Amendment guarantees includes all modes of "communication of ideas by conduct," and that his conduct is within this definition because he did it in "demonstration against the war and against the draft."

We cannot accept the view that an apparently limitless variety of conduct can be labelled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling;<sup>22</sup> substantial;<sup>23</sup> subordi-

<sup>22</sup> *NAACP v. Button*, 371 U. S. 415, 438 (1963); see also *Sherbert v. Verner*, 374 U. S. 398, 403 (1963).

<sup>23</sup> *NAACP v. Button*, 371 U. S. 415, 444 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 464 (1958).

nating;<sup>24</sup> paramount;<sup>25</sup> cogent;<sup>26</sup> strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. We find that the 1965 Amendment to § 462 (b)(3) of the Universal Military Training and Service Act meets all of these requirements, and consequently that O'Brien can be constitutionally convicted for violating it.

The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. *Lichter v. United States*, 334 U. S. 742, 755-758 (1948); *Selective Draft Law Cases*, 245 U. S. 366 (1918); see also *Ex parte Quirin*, 317 U. S. 1, 25-26 (1942). The power of Congress to classify and conscript manpower for military service is "beyond question." *Lichter v. United States*, *supra*, at 756; *Selective Draft Law Cases*, *supra*. Pursuant to this power, Congress may establish a system of registration for individuals liable for training and service, and may require such individuals within reason to cooperate in the registration system. The issuance of certificates indicating the registration and eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system. And legislation

<sup>24</sup> *Bates v. Little Rock*, 361 U. S. 516, 524 (1960).

<sup>25</sup> *Thomas v. Collins*, 323 U. S. 516, 530 (1945); see also *Sherbert v. Verner*, 374 U. S. 398, 406 (1963).

<sup>26</sup> *Bates v. Little Rock*, 361 U. S. 516, 524 (1960).

<sup>27</sup> *Sherbert v. Verner*, 374 U. S. 398, 408 (1963).



to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration.

O'Brien's argument to the contrary is necessarily premised upon his unrealistic characterization of Selective Service certificates. He essentially adopts the position that such certificates are so many pieces of paper designed to notify registrants of their registration or classification, to be retained or tossed in the wastebasket according to the convenience or taste of the registrant. Once the registrant has received notification, according to this view, there is no reason for him to retain the certificates. O'Brien notes that most of the information on a registration certificate serves no notification purpose at all; the registrant hardly needs to be told his address and physical characteristics. We agree that the registration certificate contains much information of which the registrant needs no notification. This circumstance, however, leads not to the conclusion that the certificate serves no purpose but that, like the classification certificate, it serves purposes in addition to initial notification. Many of these purposes would be defeated by the certificates' destruction or mutilation. Among these are:

1. The registration certificate serves as proof that the individual described thereon has registered for the draft. The classification certificate shows the eligibility classification of a named but undescribed individual. Voluntarily displaying the two certificates is an easy and painless way for a young man to dispel a question as to whether he might be delinquent in his Selective Service obligations. Correspondingly, the availability of the certificates for such display relieves the Selective Service System of the administrative burden it would otherwise have in verifying the registration and classification of all suspected delinquents. Further, since both certificates are in the nature of "receipts" attesting that the regis-



trant has done what the law requires, it is in the interest of the just and efficient administration of the system that they be continually available, in the event, for example, of a mix-up in the registrant's file. Additionally, in a time of national crisis, reasonable availability to each registrant of the two small cards assures a rapid and uncomplicated means for determining his fitness for immediate induction, no matter how distant in our mobile society he may be from his local board.

2. The information supplied on the certificates facilitates communication between registrants and local boards, simplifying the system and benefiting all concerned. To begin with, each certificate bears the address of the registrant's local board, an item unlikely to be committed to memory. Further, each card bears the registrant's Selective Service number, and a registrant who has his number readily available so that he can communicate it to his local board when he supplies or requests information can make simpler the board's task in locating his file. Finally, a registrant's inquiry, particularly through a local board other than his own, concerning his eligibility status is frequently answerable simply on the basis of his classification certificate; whereas, if the certificate were not reasonably available and the registrant were uncertain of his classification, the task of answering his questions would be considerably complicated.

3. Both certificates carry continual reminders that the registrant must notify his local board of any change of address, and other specified changes in his status. The smooth functioning of the system requires that local boards be continually aware of the status and whereabouts of registrants, and the destruction of certificates deprives the system of a potentially useful notice device.

4. The regulatory scheme involving Selective Service certificates includes clearly valid prohibitions against the alteration, forgery or similar deceptive misuse of certifi-

cates. The destruction or mutilation of certificates obviously increases the difficulty of detecting and tracing abuses such as these. Further, a mutilated certificate might itself be used for deceptive purposes.

The many functions performed by Selective Service certificates establish beyond doubt that Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and wilfully destroy or mutilate them. And we are unpersuaded that the pre-existence of the nonpossession regulations in any way negates this interest.

In the absence of a question as to multiple punishment, it has never been suggested that there is anything improper in Congress providing alternative statutory avenues of prosecution to assure the effective protection of one and the same interest. Compare the majority and dissenting opinions in *Gore v. United States*, 357 U. S. 386 (1958).<sup>28</sup> Here, the pre-existing avenue of prosecution was not even statutory. Regulations may be modified or revoked from time to time by administrative discretion. Certainly, the Congress may change or supplement a regulation.

Equally important, a comparison of the regulations with the 1965 Amendment indicates that they protect overlapping but not identical governmental interests, and that they reach somewhat different classes of wrongdoers.<sup>29</sup> The gravamen of the offense defined by the statute is the deliberate rendering of certificates unavailable for the various purposes which they may serve. Whether registrants keep their certificates in their per-

<sup>28</sup> Cf. *Milanovich v. United States*, 365 U. S. 551 (1961); *Heflin v. United States*, 358 U. S. 415 (1959); *Prince v. United States*, 352 U. S. 322 (1957).

<sup>29</sup> Cf. *Milanovich v. United States*, 365 U. S. 551 (1961); *Heflin v. United States*, 358 U. S. 415 (1959); *Prince v. United States*, 352 U. S. 322 (1957).

sonal possession at all times, as required by the regulations, is of no particular concern under the 1965 Amendment, as long as they do not mutilate or destroy the certificates so as to render them unavailable. Although as we note below we are not concerned here with the nonpossession regulations, it is not inappropriate to observe that the essential elements of nonpossession are not identical with those of mutilation or destruction. Finally, the 1965 Amendment, like § 12 (b) which it amended, is concerned with abuses involving *any* issued Selective Service certificates, not only with the registrant's own certificates. The knowing destruction or mutilation of someone else's certificates would therefore violate the statute but not the nonpossession regulations.

We think it apparent that the continuing availability to each registrant of his Selective Service certificates substantially furthers the smooth and proper functioning of the system that Congress has established to raise armies. We think it also apparent that the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances. For these reasons, the Government has a substantial interest in assuring the continuing availability of issued Selective Service certificates.

It is equally clear that the 1965 Amendment specifically protects this substantial governmental interest. We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. Compare *Sherbert v. Verner*, 374 U. S. 398, 407-408 (1963), and the cases cited therein. The 1965 Amendment prohibits such conduct and does nothing more. In other words, both the governmental interest and the operation of the 1965 Amendment are limited to the noncommuni-

cative aspect of O'Brien's conduct. The governmental interest and the scope of the 1965 Amendment are limited to preventing a harm to the smooth and efficient functioning of the Selective Service System. When O'Brien deliberately rendered unavailable his registration certificate, he wilfully frustrated this governmental interest. For this noncommunicative impact of his conduct, and for nothing else, he was convicted.

The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg v. California*, 283 U. S. 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also, *NLRB v. Fruit & Vegetable Packers Union*, 377 U. S. 58, 79 (concurring opinion) (1964).

In conclusion, we find that because of the Government's substantial interest in assuring the continuing availability of issued Selective Service certificates, because amended § 462 (b) is an appropriately narrow means of protecting this interest and condemns only the independent noncommunicative impact of conduct within its reach, and because the noncommunicative impact of O'Brien's act of burning his registration certificate frustrated the Government's interest, a sufficient governmental interest has been shown to justify O'Brien's conviction.

### III.

O'Brien finally argues that the 1965 Amendment is unconstitutional as enacted because what he calls the "purpose" of Congress was "to suppress freedom of



speech." We reject this argument because under settled principles the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional.

It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:

"The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray v. United States*, 195 U. S. 27, 56 (1904).

This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected by Mr. Justice Brandeis for the Court in *Arizona v. California*, 283 U. S. 423, 455 (1931).

Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature,<sup>30</sup> because the benefit to sound decision-making in

<sup>30</sup> The Court may make the same assumption in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose. The principal class of cases is readily apparent—those in which statutes have been challenged as bills of attainder. This Court's decisions have defined a bill of attainder as a legislative Act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial. In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements—specificity in identification, punishment and lack of a judicial trial—are contained in the statute. The inquiry into whether the challenged statute contains the necessary element of punishment has on occasion led the Court to examine the legislative motive in



this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork. We decline to void essentially on the ground that it is unwise legislation which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a "wiser" speech about it.

O'Brien's position, and to some extent that of the court below, rests upon a misunderstanding of *Grosjean v. American Press Co.*, 297 U. S. 233 (1936), and *Gomillion v. Lightfoot*, 364 U. S. 339 (1960). These cases stand not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional. Thus, in *Grosjean* the Court, having concluded that the right of publications to be free from certain kinds of taxes was a freedom of the press protected by the First Amendment, struck down a statute which on its face did nothing other than impose

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enacting the statute. See, e. g., *United States v. Lovett*, 328 U. S. 303 (1946). Two other decisions not involving a bill of attainder analysis contain an inquiry into legislative purpose or motive of the type that O'Brien suggests we engage in in this case. *Kennedy v. Mendoza-Martinez*, 372 U. S. 144, 169-184 (1963); *Trop v. Dulles*, 356 U. S. 86, 95-97 (1958). The inquiry into legislative purpose or motive in *Kennedy* and *Trop*, however, was for the same limited purpose as in the bill of attainder decisions—i. e., to determine whether the statutes under review were punitive in nature. We face no such inquiry in this case. The 1965 Amendment to § 462 (b) was clearly penal in nature, designed to impose criminal punishment on designated acts.

just such a tax. Similarly, in *Gomillion*, the Court sustained a complaint which, if true, established that the "inevitable effect," 364 U. S., at 341, of the redrawing of municipal boundaries was to deprive the petitioners of their right to vote for no reason other than that they were Negro. In these cases, the purpose of the legislation was irrelevant, because the inevitable effect—the "necessary scope and operation," *McCray v. United States*, 195 U. S. 27, 59 (1904)—abridged constitutional rights. The statute attacked in the instant case has no such inevitable unconstitutional effect, since the destruction of Selective Service certificates is in no respect inevitably or necessarily expressive. Accordingly, the statute itself is constitutional.

We think it not amiss, in passing, to comment upon O'Brien's legislative purpose argument. There was little floor debate on this legislation in either House. Only Senator Thurmond commented on its substantive features in the Senate. 111 Cong. Rec. 19746, 20433. After his brief statement, and without any additional substantive comments, the bill, H. R. 10306, passed the Senate. 111 Cong. Rec. 20434. In the House debate only two Congressmen addressed themselves to the Amendment—Congressmen Rivers and Bray. 111 Cong. Rec. 19871, 19872. The bill was passed after their statements without any further debate by a vote of 393 to 1. It is principally on the basis of the statements by these three Congressmen that O'Brien makes his congressional "purpose" argument. We note that if we were to examine legislative purpose in the instant case, we would be obliged to consider not only these statements but also the more authoritative reports of the Senate and House Armed Services Committees. The portions of those reports explaining the purpose of the Amendment are reproduced in the Appendix in their entirety. While both reports make clear a concern with the "defiant"

destruction of so-called "draft cards" and with "open" encouragement to others to destroy their cards, both reports also indicate that this concern stemmed from an apprehension that unrestrained destruction of cards would disrupt the smooth functioning of the Selective Service System.

## IV.

Since the 1965 Amendment to § 12 (b)(3) of the Universal Military Training and Service Act is constitutional as enacted and as applied, the Court of Appeals should have affirmed the judgment of conviction entered by the District Court. Accordingly, we vacate the judgment of the Court of Appeals, and reinstate the judgment and sentence of the District Court. This disposition makes unnecessary consideration of O'Brien's claim that the Court of Appeals erred in affirming his conviction on the basis of the nonpossession regulation.<sup>31</sup>

*It is so ordered.*

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

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<sup>31</sup> The other issues briefed by O'Brien were not raised in the petition for certiorari in No. 232 or in the cross-petition in No. 233. Accordingly, those issues are not before the Court.

## APPENDIX TO OPINION OF THE COURT.

### PORTIONS OF THE REPORTS OF THE COMMITTEES ON ARMED SERVICES OF THE SENATE AND HOUSE EXPLAINING THE 1965 AMENDMENT.

The "Explanation of the Bill" in the Senate Report is as follows:

"Section 12 (b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides, among other things, that a person who forges, alters, or changes a draft registration certificate is subject to a fine of not more than \$10,000 or imprisonment of not more than 5 years, or both. There is no explicit prohibition in this section against the knowing destruction or mutilation of such cards.

"The committee has taken notice of the defiant destruction and mutilation of draft cards by dissident persons who disapprove of national policy. If allowed to continue unchecked this contumacious conduct represents a potential threat to the exercise of the power to raise and support armies.

"For a person to be subject to fine or imprisonment the destruction or mutilation of the draft card must be 'knowingly' done. This qualification is intended to protect persons who lose or mutilate draft cards accidentally." S. Rep. No. 589, 89th Cong., 1st Sess. (1965).

And the House Report explained:

"Section 12 (b)(3) of the Universal Military Training and Service Act of 1951, as amended, provides that a person who forges, alters, or in any manner changes his draft registration card, or any notation duly and validly inscribed thereon, will be subject to a fine of \$10,000 or imprisonment of not more than 5 years. H. R. 10306 would amend this provision to make it apply also to those persons who knowingly destroy or knowingly mutilate a draft registration card.

"The House Committee on Armed Services is fully aware of, and shares in, the deep concern expressed throughout the Nation over the increasing incidences in which individuals and large groups of individuals openly defy and encourage others to defy the authority of their Government by destroying or mutilating their draft cards.

"While the present provisions of the Criminal Code with respect to the destruction of Government property may appear broad enough to cover all acts having to do with the mistreatment of draft cards in the possession of individuals, the committee feels that in the present critical situation of the country, the acts of destroying or mutilating these cards are offenses which pose such a grave threat to the security of the Nation that no question whatsoever should be left as to the intention of the Congress that such wanton and irresponsible acts should be punished.

"To this end, H. R. 10306 makes specific that knowingly mutilating or knowingly destroying a draft card constitutes a violation of the Universal Military Training and Service Act and is punishable thereunder; and that a person who does so destroy or mutilate a draft card will be subject to a fine of not more than \$10,000 or imprisonment of not more than 5 years." H. R. Rep. No. 747, 89th Cong., 1st Sess. (1965).



# SUPREME COURT OF THE UNITED STATES

Nos. 232 AND 233.—OCTOBER TERM, 1967.

United States, Petitioner,

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v.

David Paul O'Brien.

David Paul O'Brien, Petitioner,

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v.

United States.

On Writs of Certiorari  
to the United States  
Court of Appeals for  
the First Circuit.

[May 27, 1968.]

MR. JUSTICE HARLAN, concurring.

The crux of the Court's opinion, which I join, is of course its general statement, *ante*, p. 9, that:

"a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."

I wish to make explicit my understanding that this passage does not foreclose consideration of First Amendment claims in those rare instances when an "incidental" restriction upon expression, imposed by a regulation which furthers an "important or substantial" governmental interest and satisfies the Court's other criteria, in practice has the effect of entirely preventing a "speaker" from reaching a significant audience with whom he could not otherwise lawfully communicate. This is not such a case, since O'Brien manifestly could have conveyed his message in many ways other than by burning his draft card.



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[May 27, 1968.]

MR. JUSTICE DOUGLAS, dissenting.

The Court states that the constitutional power of Congress to raise and support armies is "broad and sweeping" and that Congress' power "to classify and conscript manpower for military service is 'beyond question.'" This is undoubtedly true in times when, by declaration of Congress, the Nation is in a state of war. The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war.<sup>1</sup> That question has not

<sup>1</sup> Neither of the decisions cited by the majority for the proposition that Congress' power to conscript men into the armed services is "'beyond question'" concerns peacetime conscription. As I have shown in my dissenting opinion in *Holmes v. United States*, post, p. —, the *Selective Draft Law Cases*, 245 U. S. 366, decided in 1918, upheld the constitutionality of a conscription act passed by Congress more than a month after war had been declared on the German Empire and which was then being enforced in time of war. *Lichter v. United States*, 334 U. S. 742, concerned the constitutionality of the Renegotiation Act, another wartime measure, enacted by Congress over the period of 1942-1945 (*id.*, at 745, n. 1) and applied in that case to excessive war profits made in 1942-1943 (*id.*, at 753). War had been declared, of course, in 1941 (55 Stat. 795). The Court referred to Congress' power to raise armies in discussing the "background" (*ibid.*) of the Renegotiation Act, which it upheld as a valid exercise of the War Power.

been briefed nor was it presented in oral argument; but it is, I submit, a question upon which the litigants and the country are entitled to a ruling. I have discussed in *Holmes v. United States*, *post*, p. —, the nature of the legal issue and it will be seen from my dissenting opinion in that case that this Court has never ruled on the question. It is time that we made a ruling. This case should be put down for reargument and heard with *Holmes v. United States* and with *Hart v. United States*, *post*, p. —, in which the Court today denies certiorari.<sup>2</sup>

The rule that this Court will not consider issues not raised by the parties is not inflexible and yields in "exceptional cases" (*Duignan v. United States*, 274 U. S. 195, 200), to the need correctly to decide the case before the court. *E. g.*, *Erie R. Co. v. Tompkins*, 304 U. S. 64; *Terminiello v. Chicago*, 337 U. S. 1.

In such a case it is not unusual to ask for reargument. (*Sherman v. United States*, 356 U. S. 369, 379, n. 2, Frankfurter, J., concurring) even on a constitutional question not raised by the parties. In *Abel v. United States*, 362 U. S. 217, the petitioner had conceded that an administrative deportation arrest warrant would be valid for its limited purpose even though not supported by a sworn affidavit stating probable cause; but the Court ordered reargument on the question whether the warrant had been validly issued in petitioner's case. 362 U. S., at 219, n. 1; U. S. Sup. Ct. Journal, October Term, 1958, p. 193. In *Lustig v. United States*, 338 U. S. 74, the petitioner argued that an exclusionary rule should apply to the fruit of an unreasonable search by state officials solely because they acted in concert with federal officers (see *Weeks v. United States*, 232 U. S. 383; *Byars*

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<sup>2</sup> Today the Court also denies stays in *Shiffman v. Selective Service Board No. 3*, and *Zigmond v. Selective Service Board No. 16*, where punitive delinquency regulations are invoked against registrants, decisions that present a related question.

v. *United States*, 273 U. S. 28). The Court ordered reargument on the question raised in a then pending case, *Wolf v. Colorado*, 338 U. S. 25: applicability of the Fourth Amendment to the States. Journal, October Term, 1947, p. 298. In *Donaldson v. Read Magazine*, 333 U. S. 178, the only issue presented, according to both parties; was whether the record contained sufficient evidence of fraud to uphold an order of the Postmaster General. Reargument was ordered on the constitutional issue of abridgment of First Amendment freedoms. 333 U. S., at 181-182; Journal, October Term, 1947, p. 70. Finally, in *Musser v. Utah*, 333 U. S. 95, 96, reargument was ordered on the question of unconstitutional vagueness of a criminal statute, an issue not raised by the parties but suggested at oral argument by Justice Jackson. Journal, October Term, 1947, p. 87.

These precedents demonstrate the appropriateness of restoring the instant case to the calendar for reargument on the question of the constitutionality of a peacetime draft and having it heard with *Holmes v. United States* and *Hart v. United States*.